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No. 04-1315

IN THE

Supreme Court of the United States

LONG ISLAND CARE AT HOME, LTD. and MARYANN OSBORNE,

Petitioners,

—v.—

EVELYN COKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 29 C.F.R. § 552.109(a)—which has exempted third-party employers of home health care aides from federal minimum wage and overtime pay requirements for the past 30 years—warrants judicial deference and is therefore valid and enforceable.

2. Whether a court may deny *Skidmore* deference to an agency regulation, and thereby invalidate the rule, without first affording interested parties an opportunity to submit evidence in support of the regulation's "power to persuade."

RULE 29.6 STATEMENT

Petitioner Long Island Care at Home, Ltd. has no parent company, and there are no publicly held companies that hold any stock of Long Island Care at Home, Ltd.

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Petitioners Long Island Care at Home Ltd. and Maryann Osborne ("Petitioners") respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 376 F.3d 118. (1a-30a).[1] The opinion of United States District Court for the Eastern District of New York is reported at 267 F. Supp. 2d 332. (36a-54a).

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2004. A petition for rehearing with suggestion for rehearing *en banc* was denied on January 10, 2005 (31a-32a). Petitioners' motion to stay issuance of the mandate was granted by the court of appeals on March 22, 2005. (33a-35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. In pertinent part, section 13(a)(15) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(a)(15) ("§ 213(a)(15)") provides:

> (a) Minimum wage and maximum hour requirements
>
> The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and

[1] Numbers followed by the letter "a" within parentheses indicate page references to the appendix to this petition.

section 207 of this title shall not apply with respect to—

(15) any employee . . . employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]).

2. In pertinent part, 29 C.F.R. § 552.3 provides:

Domestic service employment.

As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. * * *

3. In pertinent part, 29 C.F.R. § 552.6 provides:

Companionship services for the aged or infirm.

As used in section 13(a)(15) of the Act, the term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or infirmity, cannot care for his or her own needs. * * *

4. In pertinent part, 29 C.F.R. § 552.109(a) provides:

Third party employment.

(a) Employees who are engaged in providing companionship services as defined in [29 C.F.R.] § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15). * * *

STATEMENT OF THE CASE

This case concerns whether the Labor Department regulation governing the application of federal minimum wage and overtime pay requirements to home health care workers employed by health care agencies warrants judicial deference and is valid. Rejecting the holdings of every other court to consider the issue, including that of another circuit, the court of appeals invalidated a keystone regulation for the home health care community that has been in place for more than 30 years.

1. The Statutory and Regulatory Scheme

In 1974, Congress extended the FLSA's minimum wage and overtime pay requirements to include "domestic service" employees. *See* Fair Labor Standards Amendments of 1974, PL 93-259, § 7, 55 Stat. 88 (1974). Congress simultaneously excluded from such coverage, however, "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves . . ." *Id.* (codified at 29 U.S.C. § 213(a)(15)). Congress defined neither "domestic service employment" nor "companionship services," but instead left the specification of those terms entirely to the Department of Labor. *See id.* (leaving exemption's application "as such terms are defined and delimited by regulations of the Secretary"). Indeed, as reflected in the House Conference Report, Congress "expect[ed] the Secretary to immediately undertake a program utilizing all feasible administrative procedures to apprise employers of their responsibilities under the Act and to notify employees of their rights and entitlements under the Act." H.R. Conf. Rep.

No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865.[2]

The Secretary complied. The Department of Labor commenced a formal notice-and-comment rule making proceeding in October 1974. *See* 39 Fed. Reg. 35,382 (Oct. 1, 1974). In February 1975, the agency promulgated regulations governing the application of the FLSA to domestic service employees. *See* 40 Fed. Reg. 7404 (Feb. 20, 1975).

For the purposes of applying § 213(a)(15), the Secretary defined "domestic service employment" to mean "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3.[3] The Secretary likewise defined "companionship services" to mean "those services which provide fellowship, care, and protection for a person who, because of advanced age or infirmity, cannot care for his or her own needs." 29 C.F.R. § 552.6.[4] Finally,

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[2] The Secretary was also instructed by the Conference Committee to "adopt regulations and enforcement procedures to require that employers are reasonably apprised of when their obligation regarding the payment of the minimum wage commences." H.R. Conf. Rep. No. 93-953 (1974), *reprinted in* 1974 U.S.C.C.A.N. 2862, 2865.

[3] 29 C.F.R. § 552.3 further states that "domestic service employment" includes "employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive."

[4] In addition, the regulation explains that "[s]uch services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services." 29 C.F.R. § 552.6. Furthermore, although

the agency's regulations directed that "[e]mployees who are engaged in providing companionship services as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)." 29 C.F.R. § 552.109(a).[5]

These regulations have been in place since 1975. Since then, Congress has amended § 213 of the FLSA seven times, and it has never suggested any disapproval for § 552.109(a).

2. Litigation History

In 2002, respondent Evelyn Coke ("Respondent") commenced this action in the United States District Court for the Eastern District of New York. (36a). Respondent alleged that "she was employed as a 'home

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employees performing "companionship services" may also perform "general household work," the regulation makes clear that such work must be "incidental, *i.e.*, [that it] does not exceed 20 percent of the total weekly hours worked." *Id.* Finally, the regulation states that the "term 'companionship services' does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse." *Id.*

[5] The final version of 29 C.F.R. § 552.109(a) promulgated by the Department of Labor—which exempts home health care workers employed by third-party employers from federal minimum wage and overtime pay requirements—differed significantly from the original version that appeared in the agency's notice of proposed rulemaking. The first version of the regulation did not exempt third-party employees from the requirements of the FLSA. *See* 39 Fed. Reg. 35,382 (Oct. 1, 1974). Upon further consideration, however, the agency changed its view and explained that the FLSA's companionship services exemption could be "available to . . . third party employers since they apply" under § 213(a)(15) "to 'any employee' engaged 'in' the enumerated services." 40 Fed. Reg. at 7405.

health care attendant' by [Petitioners], who did not pay her minimum wage or overtime compensation." (4a, 37a-38a). Although Respondent maintained that "she was entitled to" such compensation under the FLSA (38a), she conceded that "the 'companionship services' exemption to the FLSA, as defined and interpreted by [Department of Labor] regulations, applie[d] to her employment and that if the regulations at issue [were] enforceable, she [could] not prevail." (5a). Respondent stated that "the purpose of this action was to determine the validity of" 29 C.F.R. §§ 552.6 and 552.109(a) (37a), and described this litigation as "a test case" (5a).[6]

Petitioners moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, invoking the FLSA exemption implemented by 29 C.F.R. §§ 552.6 and 552.109(a). (36a-37a). Respondent opposed the motion by arguing that both regulations were invalid because they were "inconsistent with Congress's intent of extending coverage of the FLSA to domestic service employees." (42a). Specifically, Respondent asserted that "the definition of 'companionship services' in Section 552.6 [was] overbroad and that Section 552.109(a) improperly extend[ed] the [minimum wage and overtime pay] exemption to employees who are employed by an agency." (42a-43a).

The district court rejected Respondent's arguments. Applying the standard of review for administrative action laid down in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"), the district court afforded §§ 552.6 and 552.109(a) the highest level of judicial deference. (44a-

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[6] Respondent's complaint also asserted "identical" claims "under the Labor Law of the State of New York and the New York Minimum Wage Act." (38a).

52a). The district court recognized that Congress had expressly delegated to the Secretary of Labor the authority to define and delimit the terms contained in § 213(a)(15) (37a), and that §§ 552.6 and 552.109(a) embodied a long-standing, contemporaneous construction of the statute by the agency charged with its administration (45a-46a). After reviewing the relevant statutory and regulatory history, as well as the existing case law addressing the validity of §§ 552.6 and 552.109(a), the district court concluded that the regulations were a reasonable construction with of FLSA. (52a). The court therefore held that §§ 552.6 and 552.109(a) carried the force of law and granted Petitioners' motion for judgment on the pleadings. (54a).

On appeal, the Second Circuit affirmed the district court's decision in part and reversed in part. (4a). Applying *Chevron*, the court of appeals upheld 29 C.F.R. § 552.6. (3a). Petitioners do not seek review of that holding.

Unlike the district court, however, the court of appeals invalidated 29 C.F.R. § 552.109(a). (3a-4a). In so doing, the Second Circuit again began its analysis by applying *Chevron*. Guided by this Court's ruling in *United States v. Mead Corp.*, 533 U.S. 218 (2001) ("*Mead*")—that an agency regulation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority," *id.* at 226-27—the court of appeals decided that such deference was unwarranted here.[7] The Second Circuit rested this determination upon two considerations. First, the

[7] Notably, the court did *not* hold that § 552.109(a) was inconsistent with the plain language of the statute.

court noted that the Department of Labor had placed § 552.109(a) within a regulatory subpart entitled, "Interpretations" rather than under the heading of "General Regulations." (22a). Second, the court emphasized that the Department of Labor did not list § 552.109(a) among those regulations " 'required by' " § 215(a)(15). (23a). On those bases, the court concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the [agency's] own account, it was self-consciously not promulgated in the exercise of Congress's delegated authority pursuant to § 215(a)(15)." (*Id.*).

The court of appeals then set out to determine whether § 552.109(a) should nevertheless receive judicial deference under what it characterized as *Mead*'s "vague prescription to 'tailor deference to variety,' " and considered whether § 552.109(a) had the " 'power to persuade' " under the standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("*Skidmore*"). (25a). Upon examining several factors, the court of appeals held that the regulation was invalid because it was inconsistent with legislative intent, other Department of Labor regulations, and the agency's actions over time. (26a). The court further concluded that the Department of Labor—which had submitted an *amicus* brief on appeal arguing that the challenged regulations warranted *Chevron* deference—had failed to "proffer valid reasoning in support of § 552.109(a)'s enforceability." (*Id.*).

Accordingly, the Second Circuit gave no deference whatsoever to the Labor Department's considered judgment.

3. The Effects of Invalidating 29 C.F.R. § 552.109(a)

Petitioners currently employ approximately forty home health care aides, who provide companionship services to approximately thirty homebound patients. (79a).

Pursuant to § 552.109(a)'s exemption from federal minimum and overtime wage requirements, Petitioners pay their employees $8.00 per hour for an average 70-hour work week, or approximately $560.00 per week. (79a-80a). Without § 552.109(a)'s exemption, however, Medicaid reimbursement limitations on home health care services will create tremendous and unsustainable losses for Petitioners and many other agency employers of home health care workers. (80a, 84a (invalidation of § 52.109(a) "will have serious negative impact on the access and quality of care for tens of thousands of older and disabled individuals receiving services . . . based upon significant increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement")).

To avoid such losses, Petitioners must now limit each employee's workweek to forty hours, thereby avoiding higher overtime pay rates. (80a). Petitioners may also be forced to reduce hourly wages. (*Id.*). In consequence, most of Petitioners' employees will suffer an average 43% weekly salary reduction. (*Id.*).

This hardship will not be limited to Petitioners' employees. Industry experts and major home health care providers agree that home health care workers across New York State will likewise suffer. (103a, 92a-93a, 128a-133a). "While elimination of the third-party employer exemption would increase overtime rates for home care workers, information from agencies throughout New York State establishes that it would not increase—and in many cases would reduce—actual earnings for workers." (1132a).

But the impact of the Second Circuit's ruling extends much farther. As an unavoidable consequence of § 552.109(a)'s invalidation, thousands of homebound

elderly and infirm people will receive compromised care. In order to compensate for the lost exemption, home health care agencies must limit the number of hours that each employee may work. Hence, patients will have to accept services from a greater number of workers, each of whom will work fewer hours. According to both home health care providers and state regulators, this scenario will generate serious problems affecting care.

The relationship between patient and home care aide is intimate and confidential. "The home attendant spends up to 24 hours each day in a client's home, tending to needs of an extremely personal nature, such as bathing or toileting." (96a-97a). It usually takes considerable time to establish the necessary trust and comfort level between caregiver and client, "and clients often are very unwilling to enter into such a relationship with more than one or two such individuals." (97a; *see also* 81a).

Consequently, the need to use multiple caregivers for an individual client often creates a "troubling dynamic" that "assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being." (79a; *see also* 97a ("Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.")). This problem is further compounded by the fact that there are likely only a limited number of home care workers who will accept shortened work shifts at multiple work sites, thus leaving many patients unattended for hours. (103a). In such circumstances, "home care patients would either be denied some periods of care or receive care with less continuity," *i.e.*, patients would be forced to receive ser-

vices from multiple health care workers. (*Id. see also* 132a).

Either outcome is problematic. Depriving homebound individuals of needed care and companionship is an unacceptable option. So is the idea of using multiple workers to provide care for a single patient. "Continuity of care is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible." (132a (citation omitted)). But, by creating this Hobson's choice, the decision of the court of appeals has placed the home health care community in an impossible situation—endangering the well-being of thousands of patients and workers alike.

REASONS FOR GRANTING THE PETITION

By invalidating § 552.109(a), the court of appeals jettisoned *thirty* years of administrative practice, congressional acquiescence, judicial approval, and labor-market structure. This ruling will have a profoundly negative impact on the home health care sector. The delicate equilibrium fostered by § 552.109(a) is a critical component in sustaining the ability of home health care providers to supply much needed services to many thousands of elderly and infirm individuals. In the absence of this regulation, an entire community of patients and caretakers will be thrust into sudden and dangerous disarray. This result will hurt everyone affected.

Because the public funding that pays for these services is both strictly limited and shrinking (102a, *see also* 85a-86a; 129a), the Second Circuit's ruling has already disrupted the way in which tens of thousands of homebound people residing in New York State (and possibly many thousands more living in other regions) receive impor-

tant health care assistance. It has also significantly decreased the availability of work for home health care aides and their attendant income. In combination, these consequences threaten the important public policy favoring home care—in many cases leaving institutionalization as a patient's only available health care option, despite its higher economic costs and its enormous toll on patients' quality of life.

This Court should grant the petition for three compelling reasons. First, this case raises issues of exceptional importance regarding the proper allocation of hundreds of millions of dollars each year in federal, state, and local funding for health cares services. The impact of this ruling on the care provided to homebound people, and the economic well being of their immediate care providers, also raises matters of exceptional importance. Indeed, the court of appeals' ruling affects the fundamental viability of home health care as an option to institutionalization, which is an issue of extreme importance for all parties involved.

Second, the decision below directly conflicts with the decision of the Tenth Circuit in *Johnson v. Volunteers of America, Inc.*, 215 F.3d 559 (10th Cir. 2001), which upheld § 552.109(a) under *Chevron*. The application of federal minimum wage and overtime pay requirements to home health care workers, and the impact that those requirements have on the provision of such important services, should not vary between federal judicial circuits.

And third, the judgment of the court of appeals departs from the consistent decisions of this Court regarding judicial deference to agency rulemaking. The Second Circuit's misapplication of *Chevron* and *Mead* evades the Department of Labor's manifest intent to exercise its statutory authority in defining the boundaries of

§ 213(a)(15)—rewriting those boundaries as that court saw fit. Moreover, the court of appeals' misapplication of *Skidmore* puts in jeopardy the efficacy of many administrative decisions that warrant some but not controlling deference from the courts. The Second Circuit invalidated § 552.109(a) under *Skidmore* at the pleading stage of these proceedings, without any consideration of facts that support the agency's judgment. Guidance to the lower federal courts as to the necessary development and the proper scope of a factual record when determining a regulation's "power to persuade" would be of great benefit in a wide variety of cases involving the intersection of *Chevron*, *Mead*, and *Skidmore*.

1. This Case Raises Issues of Exceptional Importance

The fundamental question presented by this case—whether § 552.109(a) is valid and enforceable—undeniably raises issues of exceptional importance. The "problem" created by the court of appeals' invalidation of § 552.109(a) reaches far "beyond the academic or episodic." *Rice v. Souix City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). It will have a staggering impact on home health care costs throughout this region, and it will force largely government-funded agencies to restructure their business operations in ways that will seriously harm their patients and employees.

For example, New York City alone estimates that the Second Circuit's decision will "increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $263 million annually." (93a). Consequently, the city's "Medicaid funding will need to increase from $1.592 billion to about $1.855 billion annually in order to sustain its current client services." (*Id.*). Indeed, across New York State, home care

agencies "cannot bear the cost of compliance with the [Second Circuit's] holding without additional revenues from external sources, which are unlikely to be forthcoming." (102a).

Furthermore, one health care expert has identified a serious harm to the broader health care system that will flow from invalidating § 552.109(a). She observes that, "[b]y creating disruptions in the continuity of care by home health agencies, the [Second Circuit's] decision impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions." (86a-87a). She estimates that "a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million." (*Id.*).

The human toll of this ruling is likewise costly. The added strain on municipal, county, and state budgets triggered by the invalidation of § 552.109(a) will upset the "delicately balanced system that makes home care—a desired alternative to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State." (103a). Health care experts fear that, without adequate government funding, home care agencies "will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York." (101a). Consequently, there is deep concern that the increased expense of such services will "undermine New York's commitment" to home care as a feasible option to institutionalization. (87a-88a; *see also* 103a ("Many patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services.")).

Also disturbing are the serious hardships that home health care workers will unavoidably sustain as a result of the court of appeals' decision. The invalidation of § 552.109(a) will necessarily result in slashed income, scheduling changes, and workplace dislocations, as health care agencies try to stretch limited government funding in order to cover demands for care. (80a, 84a, 88a, 92a-97a, 101a-104a, 130a-133a). In a bitter twist, the Second Circuit's ruling will effectively penalize the very category of workers that Respondent purports to represent. (130a-131a).

This case warrants *certiorari* review. Simply put, "in view of the importance of the question presented to the [government programs] and affected individuals," *Olmstead v. Zimring*, 527 U.S. 581, 596 (1999) (granting *certiorari* to review construction of federal regulations requiring major reallocation of state resources for community care of mentally disabled), and in view of its tremendous financial ramifications, *see, e.g., Barnhart v. Walton*, 535 U.S. 212, 217 (2002) (granting *certiorari* where invalidation of social security regulation would have "create[d] additional Social Security costs of $80 billion over ten years"), this Court should grant the petition.

2. This Court Needs to Resolve an Important Circuit Split Regarding the Enforceability of 29 C.F.R. § 552.109(a)

By invalidating § 552.109(a), the Second Circuit extended the FLSA's minimum wage and overtime pay requirements to homecare workers employed by health care agencies. In *Johnson v. Volunteers of America, Inc.*, 215 F.3d 559 (10th Cir. 2001) ("*Johnson*"), however, the Tenth Circuit squarely held that § 552.109(a) was entitled to *Chevron* deference and upheld the application of § 213(a)(15)'s exemption from those FLSA requirements

to *all* home health care aides—whether employed directly by patients or by third parties. *See* 215 F.3d at 562. These two decisions are in direct conflict and create an untenable situation.[8]

The consistency (and thus quality) of care for homebound people across the country cannot turn upon the inconsistent enforcement of federal regulations. The availability of crucial health care services and the structure of homecare delivery systems should not vary between even two federal judicial circuits *because of* a disagreement among judges over the status of federal law. The ramifications of this disagreement are both unfair and inefficient. Too many lives are profoundly affected by § 552.109(a), and too many limited public resources are allocated according to its directive, for this Court to leave unresolved the conflict created by the Second Circuit. *Certiorari* review is especially warranted here.[9]

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[8] Every district court that has considered § 552.109(a) has likewise enforced the regulation. *See Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332, 341 (E.D.N.Y. 2003) (37a); *Madison v. Resources for Human Dev., Inc.*, 39 F. Supp. 2d 542, 545 n. 3 (E.D.Pa. 1999); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294, 1299 n. 2 (N.D.Okla. 1998).

[9] The court of appeals tried to downplay its split with the Tenth Circuit by noting that *Johnson* was decided one year before this Court's decision in *Mead*. (21a-22a). But *Mead*'s gloss on *Chevron* neither explains nor ameliorates the circuit conflict created by the Second Circuit's invalidation of § 552.109(a). In *Mead*, this Court expressly stated that it had left the *Chevron* rule as it was found, *see Mead*, 533 U.S. at 237-38, *see also id.* at 250 (Scalia, J., dissenting), and other courts have likewise understood *Mead* to have simply "reaffirmed" a "well established principle," *Pesquera Mares Australes Ltda. v. United State*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). Consequently, *Mead* is not an intervening change in law that might diminish the discrepancy in law between the Second and Tenth Circuits.

(*footnote continued*)

3. The Court of Appeals' Decision Conflicts with the Consistent Decisions Of this Court Regarding Judicial Deference to Agency Rulemaking

In *Mead*, this Court held that the

> administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference *was promulgated in the exercise of that authority.*

533 U.S. at 226-27 (emphasis added).

Here, the court of appeals did not dispute that Congress gave the Department of Labor authority to promulgate § 552.109(a). But the court below did dispute that § 552.109(a) satisfies the second prong of *Mead*'s directive. The Second Circuit concluded that "§ 552.109(a) does not qualify for *Chevron* deference because, by the [agency's] own account, it was self-consciously not promulgated in the exercise of Congress's delegated authority pursuant to § 213(a)(15)." (23a). The opposite is true. Contrary to the Second Circuit's assertion, the Department of Labor has consistently and openly maintained that it exercised its statutory authority in promulgating § 552.109(a).[10]

In any event, the practical reality demonstrates the significance of this conflict. § 552.109(a) is still enforceable in the Tenth Circuit and, in that region, homecare is being provided under that regulatory regime. If *Mead* somehow affected the validity of the Tenth Circuit's decision in *Johnson*, it is important that this Court grant *certiorari* in this case and say so. The equitable provision of social services requires the consistent application of federal law.

[10] This determination is the lynchpin of the court of appeals' holding and it rests upon two basic mistakes. First, the court of appeals overemphasized the agency's inclusion of § 552.109(a) within

Perhaps the agency's most obvious assertion of statutory authority appears in § 552.109(a) itself. The regulation expressly extends the FLSA's minimum wage and overtime pay exemptions to third party employers "*by virtue of section [2]13(a)(15).*" 29 C.F.R. § 552.109(a)

Subpart B of the regulations, entitled "Interpretations." (23a). Based largely upon this heading, the court of appeals inferred that § 552.109(a) is an "interpretive" rather than a "legislative" regulation, and therefore does not qualify for *Chevron* deference. (22a). This characterization is deeply flawed. As the court of appeals itself acknowledged (22a-23a), § 552.109(a) affects individual rights and obligations, which is an "important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (describing "legislative-type" rules). Moreover, the dichotomy upon which the court of appeals relies in this case is suspect, given this Court's recent statement that, "[o]f course, the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *see also Edelman v. Lynchburg College*, 535 U.S. 106, 123-24 (2002) (O'Connor, J., concurring in the judgment).

Second, because § 552.109(a) is not among the definitions listed in 29 C.F.R. § 552.2(c), the court of appeals reasoned that the agency had "effectively conceded" that § 552.109(a) was not promulgated under § 213(a)(15). (23a). This conclusion is also incorrect. § 552.109(a)'s exemption from FLSA requirements applies solely to "[e]mployees who are engaged in companionship services"—a category of employees specifically defined in 29 C.F.R. § 552.6. *See* 29 C.F.R. § 552.109(a). The definition contained in 29 C.F.R. § 552.6 *is* one of the definitions listed in 29 C.F.R. § 552.2(c). Thus, § 552.109(a) governs the application of a regulatory definition that the agency undeniably promulgated under § 213(a)(15). This close connection between § 552.109(a) and the Department of Labor's undisputed exercise of statutory authority belies any supposed concession by the agency that § 552.109(a) was not likewise promulgated. At worst, the interrelationship among 29 C.F.R. §§ 552.2(c), 552.6, and 552.109(a) makes the legislative status of § 552.109(a) ambiguous—an ambiguity that is dispositively settled by the agency's own reasonable interpretation. *See Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see also infra* at 21-22.

(2003) (emphasis added). Thus, the very text of § 552.109(a) makes clear that the Department of Labor drew its regulatory authority straight from the statute.

The Code of Federal Regulations elsewhere supports this reading. Beneath the list of regulations contained in subparts A and B is a section that identifies the source of authority for *all* of Part 552. The statement reads:

> AUTHORITY: Secs. 13(a)(15) and 13(b)(21) of the Fair Labor Standards Act, as amended (29 U.S.C. 213(a)(15), (b)(21)), 88 Stat. 62; sec. 29(b) of the Fair Labor Standards Amendments of 1974 (Pub. L. 93-259, 88 Stat. 76), *unless otherwise noted.*

29 C.F.R. Part 552 (2003) (emphasis added), at page 253. Besides this unequivocal reference to § 213(a)(15), Part 552 identifies no other authority for § 552.109(a). The inference is therefore unavoidable; the Department of Labor promulgated § 552.109(a) pursuant to § 213(a)(15).

Indeed, that "such authority was invoked" by the Department of Labor, *Mead*, 533 U.S. at 237, is again confirmed by the agency's 1974 Notice of Proposed Rulemaking for Employment of Domestic Services' Employees ("1974 NPR"). In relevant part, the 1974 NPR states:

> To implement the 1974 Amendments [to the FLSA], it is proposed to . . . add a new 29 C.F.R. Part 552 defining and delimiting, in Subpart A, the terms . . . "employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves," and setting forth, in Subpart B, a statement of policy and interpretation concerning the application of the [FLSA] to domestic service employees. *These . . . additions are proposed pursuant to the authority in section[ ] . . . [2]13(a)(15) of the [FLSA], as amended.*

39 Fed. Reg. 35,382, 35,382 (Oct. 1, 1974) (emphasis added). § 552.109(a) was one of the "additions" to 29 C.F.R. Part 552 identified by the 1974 NPR, albeit in a form that was substantially different from its final version.[11]

Over 25 years later, the Department of Labor once again reaffirmed its deliberate exercise of statutory authority. In January 2001, the agency proposed to amend § 552.109(a). The Notice of Proposed Rulemaking ("2001 NPR") made plain that the proposed amendment was

> issued *under the authority provided by section 13(a)(15)* of the FLSA (29 U.S.C. 213(a)(15)), which grants the Secretary of Labor *legislative rulemaking authority* to define and delimit the terms "employee employed in domestic services" for the

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[11] Because the final version of § 552.109(a) contained the opposite rule than was originally proposed in the 1974 NPR, the court of appeals expressed "concern" in *dictum* as to whether the agency's rulemaking notice was sufficient under the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b)(3)(A). (21a). This concern was unfounded.

The critical APA inquiry here is whether "parties affected by the final rule were put on notice that their interests were at stake," or, stated differently, "whether potential commentators would have known that an issue in which they were interested was on the table and was to be addressed by a final rule." *American Medical Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir. 1989) (internal quotation marks omitted). It is "irrelevant whether the proposal contained in the NPR was favorable to a particular party's interest," because "the obligation to comment is not limited to those *adversely* affected by the proposal." *Id.* (emphasis in original).

The Labor Department's promulgation of § 552.109(a) satisfied this standard. The 1974 NPR surely put the world on notice that an FLSA exemption for third party employers was "on the table" and "open[ ] for discussion." *Id.* at 768-69 (internal quotation marks omitted). Hence, the regulation is procedurally valid under the APA.

> purposes of exempting such workers from the minimum wage and overtime pay requirements of the FLSA.

66 Fed. Reg. 5481, 5487 (Jan. 19, 2001) (emphasis added). This straightforward proclamation of legislative rulemaking dispels any doubt that the Department of Labor used its statutory authority in promulgating § 552.109(a).

But even assuming that there remains in the regulatory history some lingering uncertainty as to the agency's intentions vis-à-vis § 552.109(a), the decision below still veers far from this Court's teaching on judicial deference. "Courts grant an agency's interpretation of its own regulations considerable legal leeway," *Barnhart*, 535 U.S. at 217; *see also Christensen*, 529 U.S. at 588, and such interpretations are "controlling unless plainly erroneous or inconsistent with the regulation," *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted). Indeed, courts "*must* defer to the [agency's] interpretation unless an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson University*, 512 U.S. at 512 (emphasis added and internal quotation marks omitted).

The pivotal question in this case for the court of appeals was whether the Department of Labor deliberately exercised its statutory authority to define and delimit the concept of "companionship services" when, in 1975, the agency promulgated § 552.109(a). (23a). The Department's statements regarding § 552.109(a) "at the time of the regulation's promulgation" strongly indicate that the Secretary of Labor invoked that authority. *Thomas Jefferson University*, 512 U.S. at 512 (internal quotation marks omitted). But any claimed ambiguity on this point was dispelled by the agency's *amicus* filing in the court of appeals. In that brief, the Department of

Labor described § 552.109(a) as a "legislative rule[ ]" (56a), which was "promulgated in 1975 *in response to* an express delegation of authority by Congress" (62a (emphasis added)). The agency further maintained that "section 552.109(a) serves to 'define and delimit' the terms of the 'companionship services' exemption *under Congress' express delegation of authority*." (66a (emphasis added)). Thus, the Department of Labor confirmed that the Secretary had deliberately invoked the agency's statutory authority in promulgating § 552.109(a). That confirmation should have been conclusive. It "reflect[s] the agency's fair and considered judgment on the matter in question," and therefore warranted controlling deference. *Auer*, 519 U.S. at 462.

Accordingly, by undertaking a *de novo* examination of a regulatory scheme that was implemented *thirty* years ago through notice-and-comment rulemaking, the Second Circuit fundamentally misapplied *Chevron*'s directive as well as other bedrock principles of administrative law.[12] Given the serious and adverse consequences of the Second Circuit's ruling, this Court should grant the petition in order to ensure that *Mead*'s clarification regarding the appropriate application of *Chevron* deference is

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[12] "[T]his Court will normally accord particular deference to an agency interpretation of longstanding duration," *Barnhart*, 535 U.S. at 220 (internal quotation marks omitted), especially when the challenged regulation is a contemporaneous construction of a statute by the agency charged with its administration, *see Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). Moreover, where, as here, Congress has amended the relevant statutory provision numerous times without expressing disapproval for an agency interpretation, the "conclusion is plain"—Congress "did not regard [the agency's action] as inconsistent with the [statute]." *Boesche v. Udall*, 373 U.S. 472, 483 (1963); *see also Barnhart*, 535 U.S. at 220; *Edelman*, 535 U.S. at 118. The court of appeals gave short-shrift to these important rules of administrative law.

not actually used by lower courts to undermine the authority of agencies to administer the law.

The Second Circuit's application of *Skidmore* is equally troubling, and presents a serious threat to the enforceability of many agency rules, regulations, and interpretations that merit some level of judicial deference. Under *Skidmore*, an informal agency regulation may command deference "proportional to its power to persuade," and thus may "claim the merit of its . . . thoroughness, logic, and expertness, its fit with prior interpretations, *and any other sources of weight*." *Mead*, 533 U.S. at 235 (internal quotation marks omitted); *see also Skidmore*, 323 U.S. at 140 (validity of challenged regulation "will depend upon . . . *all* those factors which give it the power to persuade" (emphasis added)). As the Sixth Circuit recently described this standard, "*Skidmore* permits courts to give consideration to an agency's expertise and ability to persuade, not its ability to speak with legal effect. . . . *Skidmore* thus permits an agency to *earn* the weight given to it by the courts." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 643 (6th Cir. 2004) (emphasis in original).

However, an agency's ability to "earn" persuasive force for a regulation may turn upon a factual presentation. Thus, *Mead* recognizes that the proper analysis under this standard is not limited to abstract argumentation and claimed expertise, but also includes consideration of "*any* other sources of weight." 533 U.S. at 235 (emphasis added). A *Skidmore* analysis may therefore require proceedings beyond the pleading stage, including evidentiary submissions. *See, e.g., Brown v. United States*, 327 F.3d 1198, 1206 (D.C. Cir. 2003) (considering "affidavits of various Treasury officials" in upholding under *Skidmore* agency's methodology in calculating locality pay increases). That depth of consideration was absent here.

The Second Circuit acknowledged that, "[u]nlike most, if not all, of the other courts that have considered the issues in this appeal," it reviewed Respondent's case "before summary judgment and, thus, without any factual development." (4a (footnote omitted)). Given that the court struck out on its own to undertake a *Skidmore* analysis, this was a serious misstep. By invalidating § 552.109(a) under *Skidmore* without a factual record, the court of appeals denied Petitioners the ability to identify and present important "sources of weight" from which the regulation could derive substantial support.

For example, when the Department of Labor withdrew the 2001 NPR in 2002, the agency reported that "numerous commenters on the proposed rule, including multiple government agencies . . . , seriously called into question the Department of Labor's conclusion that there would be little economic impact" from changing § 552.109(a). 67 Fed. Reg. 16,668 (April 8, 2002). That rulemaking record, which prompted the agency "to withdraw the proposed rule and terminate [its] rulemaking action," could very well bolster the persuasiveness of the regulation as it stands now. *Id.* And yet, the court of appeals had none of that information to consider before invalidating § 552.109(a). Similarly, the court of appeals had no evidence to consider from private and governmental members of the home health care community, who certainly could "bring the benefit of specialized experience to bear on the subtle questions in this case" regarding the important economic and quality control functions served by § 552.109(a). *Mead*, 533 U.S. at 235.

When the stakes of invalidating a long-standing regulation are as high as they are here, and the consequences are as potentially harmful, courts should make every effort to review "all those factors which give [a regulation] the power to persuade." *Skidmore*, 323 U.S. at 140.

The court of appeals disregarded this important rule and acted prematurely. The court's analysis merely preferred its own policy choices over those of the Department of Labor,[13] and ironically faulted the Department of Labor

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[13] The court of appeals invalidated § 552.109(a) because it is supposedly inconsistent with congressional purpose, inconsistent with other regulations and with the agency's own views over time, and is based upon invalid reasoning. (26a-29a). The court's analysis on each of these points is deeply flawed.

To start, the court's conclusion that it is "implausible, to say the least, that Congress, wishing to expand FLSA coverage would have wanted the [Department of Labor] to eliminate coverage for employees of third party employers who had previously been covered" (27a), overlooks two crucial considerations. First, Congress has amended § 213 of the FLSA seven times since its enactment in 1974 and has never disapproved § 552.109(a). This legislative record is strong evidence that Congress believes that § 552.109(a) is consistent with the statute. *See Boesche*, 373 U.S. at 483. Second, § 213(a)(15)'s legislative history suggests that Congress was trying to balance its desire to extend FLSA coverage to domestic employees against its wish to foster close, consistent and cost-controlled relationships between caregivers and clients. § 552.109(a) is certainly a reasonable accommodation of these competing legislative interests and thus warrants substantial deference. *See United States v. City of Fulton*, 475 U.S. 657, 667-68 (1986); *United States v. Shimer*, 367 U.S. 374, 383 (1961).

Similarly, the court's observation that § 552.109(a) is "jarringly inconsistent" with § 552.3 is traceably misguided. (27a). § 552.109(a) does not directly implicate § 552.3's definition of "domestic service employment;" it expressly corresponds to § 552.6's definition of "companionship services." *See* 29 C.F.R. § 552.109(a) (referencing § 552.6). Together, §§ 552.6 and 552.109(a) thus regulate the application of minimum wage and overtime pay requirements to "companionship services," which is a statutory subset of "domestic service employment." *See* 29 U.S.C. § 213(a)(15). This subset exemption for "companionship services" carved out by § 552.109(a) easily coexists with § 552.3's narrower exemption for the general category of "domestic service employment." Nor, as the Second Circuit suggests, does any inconsistency arise from the fact that the Department of Labor has previously considered changing § 552.109(a). (28a). § 552.109(a) has

for having failed to "adequately explain[ ]" the rationale underlying § 552.109(a). (28a). Of course, the agency did not participate in the district court proceedings and no party ever had the opportunity to develop a factual record.

Not surprisingly, neither *Skidmore* nor *Mead* condones this approach, as it obviously undermines the presumption that informal agency interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. In consequence, this Court should grant the petition in order to instruct lower courts on the importance of giving agencies or other interested parties a full and fair opportunity "to *earn* the weight" of a challenged regulation. *Air Brake Sys.*, 357 F.3d at 643 (emphasis in original).

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remained unchanged for 30 years, and agencies should feel free to consider revisions from time to time as good administration may require. *Chevron*, 467 U.S. at 863-64 ("An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.")

Finally, the Second Circuit's criticism of the agency's 1974 construction of § 213(a)(15) is fundamentally confused. Based upon the agency's general *regulatory* definition of "domestic service employees"—which includes only domestic service employees who are employed directly by homeowners—the court found that the extension of the *statutory* exemption from minimum wage and overtime pay requirements to employees of third party employers was contrary to the "plain language" of the statute. (29a). But the statute empowers the Department of Labor to exempt from these requirements "*any* employee employed in domestic service employment *to provide companionship services*." 27 U.S.C. § 213(a)(15) (emphasis added). Hence, § 552.109(a)'s exemption of home health care workers employed by third parties fits neatly into the statutory exemption for "*any* employee" hired "to "provide companionship services." *Id.* (emphasis added). The court of appeals' construction of § 213(a)(15) thus inexplicably ignores the statute's "companionship" qualifier.

CONCLUSION

The petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
March 29, 2005

Respectfully submitted,

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APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2003

(Argued March 4, 2004 Decided July 22, 2004)

Docket No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—v.—

LONG ISLAND CARE AT HOME, LTD., and MARYANN OSBORNE,

Defendants-Appellees.

Before:

WALKER, *Chief Judge*, KATZMANN, *Circuit Judge*, and GLEESON, *District Judge*.*

Appeal from the grant of defendants' motion for judgment on the pleadings by the United States District Court for the Eastern District of New York (Thomas C. Platt, *District Judge*), finding two regulations promul-

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* The Honorable John Gleeson, of the United States District Court for the Eastern District of New York, sitting by designation.

gated by the Department of Labor defining and interpreting the "companionship services" exemption in the Fair Labor Standards Act, 29 U.S.C.§ 213(a)(15), to be enforceable, thereby precluding plaintiff's claims for minimum wage and overtime compensation under the Act.

AFFIRMED in part; VACATED in part; and REMANDED.

HAROLD CRAIG BECKER, Service Employees International Union, AFL-CIO, Chicago, IL (Michael Shen, Constantine P. Kokkoris, New York, NY, *on the brief*), *for Plaintiff-Appellant*.

Arnold S. Klein, Meltzer, Lippe & Goldstein, LLP, Mineola, NY (on submission), *for Defendants-Appellees*.

FORD NEWMAN, Senior Attorney, United States Department of Labor (Howard M. Radzely, Acting Solicitor of Labor, Steven J. Mandel, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, *on the brief*), Washington, D.C., *for Amicus Curiae United States Secretary of Labor*.

JOHN M. WALKER, JR., *Chief Judge*:

At issue in this appeal is the enforceability of two regulations promulgated by the Department of Labor ("DOL") that define and interpret the "companionship services" exemption in the Fair Labor Standards Act

("FLSA" or "the Act"), 29 U.S.C.§ 213(a)(15). The Act generally requires minimum wage and overtime compensation; the "companionship services" exemption relieves employers from paying such compensation to those employees who work in domestic service as babysitters and companions to the elderly and infirm. The regulations at issue implement the exemption with respect to companions.

The first regulation we consider is a regulation that defines the exemption. It includes within the exemption (1) those who perform household work related to the care of the elderly or infirm and (2) those who also perform housework incidental to their "companionship services" as long as the housework accounts for less than twenty percent of the weekly hours worked. *See* 29 C.F.R. § 552.6. The second regulation we consider applies the exemption to "[e]mployees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services." *See* 29 C.F.R. § 552.109(a). The district court found both of these regulations to be entitled to the highest form of deference available to agency regulations and, accordingly, found them legally enforceable. *See Coke v. Long Island Care at Home, Ltd.*, 267 F. Supp. 2d 332 (E.D.N.Y. 2003).

We affirm the enforceability of the first regulation, § 552.6, according it the highest level of deference available to agencies pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). But we conclude that the second regulation, § 552.109(a), is neither entitled to *Chevron* deference nor enforceable; we find it to be entitled only to the more limited level of deference announced in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and reaffirmed in *United States v. Mead Corp.*, 533 U.S. 218 (2001).

Because the second regulation is unpersuasive in the context of the entire statutory and regulatory scheme, it fails *Skidmore*'s test and cannot be enforced. Accordingly, we AFFIRM in part, VACATE in part, and REMAND for further proceedings.

FACTUAL BACKGROUND

Plaintiff-appellant Evelyn Coke appeals from the judgment on the pleadings, entered pursuant to Federal Rule of Civil Procedure 12(c), in favor of defendants-appellees Long Island Care at Home, Ltd. and owner Maryann Osborne, by the United States District Court for the Eastern District of New York (Thomas C. Platt, *District Judge*). *See Coke*, 267 F. Supp. 2d at 332-41. The Secretary of Labor submitted an amicus brief arguing on behalf of defendants-appellees that the district court's ruling should be affirmed.

Unlike most, if not all, of the other courts that have considered the issues in this appeal,[2] we review Coke's case before the summary judgment stage and, thus, without any factual development. All we know is that Coke filed this action under the FLSA, alleging that she was employed as a "home healthcare attendant" by defendants, who did not pay her minimum wage or overtime compensation. While such compensation is generally

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[2] We collect the full citations to such cases here in chronological order for ease of reference: *McCune v. Or. Senior Servs. Div.*, 894 F.2d 1107 (9th Cir. 1990); *Cox v. Acme Health Servs., Inc.*, 55 F.3d 1304 (7th Cir. 1995); *Salyer v. Ohio Bureau of Workers' Comp.*, 83 F.3d 784 (6th Cir. 1996); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294 (N.D. Okla. 1998); *Johnston v. Volunteers of Am., Inc.*, 213 F.3d 559 (10th Cir. 2000); *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175 (3d Cir. 2000); *Harris v. Dorothy L. Sims Registry*, No. 00 C 3028, 2001 U.S. Dist. LEXIS 23263, 2001 WL 78448 (N.D. Ill. Jan. 29, 2001); *Welding v. Bios Corp.*, 353 F.3d 1214 (10th Cir. 2004).

required under the FLSA, Coke acknowledges that the "companionship services" exemption to the FLSA, as defined and interpreted by the DOL regulations, applies to her employment and that if the regulations at issue are enforceable, she cannot prevail. Her arguments are purely legal.

Coke contends that the two regulations defining and interpreting "companionship services" are unreasonable and impermissible in light of the statute's clear language and statutory purpose. Coke candidly calls her action a test case, "challenging the regulation[s] on [their] face." She does not allege that the regulations are being improperly applied to a subclass of employees but, rather, that they contravene legislative will and are therefore unenforceable. After the district court accorded the two regulations *Chevron* deference and found them to be permissible under the statute, it granted defendants' motion for judgment on the pleadings. This appeal followed.

DISCUSSION

I. *Standards of Review*

We review the decision of the district court *de novo* both because the judgment below was entered on the pleadings on a matter of statutory construction, *Levy v. Southbrook Int'l Invs., Ltd.*, 263 F.3d 10, 14 (2d Cir. 2001); *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir. 1994), and, more specifically, because the decision as to whether an FLSA exemption may be applied to a class of claimants is a question of law, *Freeman v. NBC*, 80 F.3d 78, 82 (2d Cir. 1996). Moreover, the question of the appropriate level of deference to accord agency regulations is one purely of law, subject to *de novo* review. *See Ossen v. Dep't of Soc. Servs. (In re Charter Oak*

Assocs.), 361 F.3d 760, 764 (2d Cir. 2004) (pure questions of law are reviewed *de novo*). *See generally* 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of lawL"). At this stage of the litigation, it is conceded by both parties that there are no disputed issues of material fact.

Our review in the FLSA context is guided by a few specialized principles. Because the FLSA is a remedial act, its exemptions are to be narrowly construed. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Mitchell v. Lublin, McGaughy & Assocs.*, 358 U.S. 207, 211 (1959). *And an employer bears the burden of proving that its employees fall within an exemption in the FLSA. See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974); *Arnold*, 361 U.S. at 392; *Donovan v. Carls Drug.*, 703 F.2d 650, 652 (2d Cir. 1983). In sum, "[t]o extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). Bearing these guiding principles in mind, we undertake our *de novo* review of the district court's decision upholding the two regulations at issue here.

II. *Statutory Scheme*

The FLSA, enacted by Congress in 1938, requires that most workers receive minimum wage and overtime compensation for hours worked in excess of forty per week. *See generally* 29 U.S.C. § 201 *et seq.* In 1974, Congress amended the FLSA to broaden its coverage to a new set of workers, previously unprotected by the Act: employees performing "domestic services." While the statute itself did not define "domestic service employment," the Senate Committee Report confirms the commonly understood meaning of the term to include those employed within the

home as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs, and the like. *See* S. Rep. No. 93-690, at 20 (1974); *see also* H.R. Rep. No. 93-913, at 35-36 (1974). However, while extending FLSA protections to employees in domestic service, Congress carved out an exemption for employees engaged in "babysitting services" and "companionship services." The exemption withholds FLSA benefits from:

> any employee employed on a casual basis in domestic service employment to provide baby-sitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary [of Labor]) . . . .

29 U.S.C.§ 213(a)(15). In order to more clearly delineate those who are subject to the exemption, the Secretary of Labor, soon after the adoption of the 1974 amendments, promulgated a series of regulations, including the two that Coke challenges here.

III. *Regulatory Scheme*

The first regulation Coke challenges was promulgated in exercise of the authority delegated by§ 213(a)(15) to define "companionship services." It defines "companionship services" as

> those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making,

> washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. § 552.6.

A related regulation (not challenged here), also promulgated in clear exercise of the authority delegated by § 213(a)(15), adopts the House Committee Report's definition of "domestic service employment." That regulation states that domestic service "refers to services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed*." 29 C.F.R. § 552.3 (emphasis added); *cf.* H.R. Rep. No. 93-913, at 35 (defining "domestic service employment" to be "services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed"); *see also* S. Rep. No. 93-690, at 20 (stating that the House's construction of "domestic service employment" to exclude third party employment is "generally accepted").

The second regulation Coke challenges, 29 C.F.R. § 552.109(a), also promulgated soon after the 1974 amendments, expressly extends the exemption by including employees "who are employed by an employer or agency other than the family or household using their services." Section 552.109(a) appears under the "Subpart B" heading, "Interpretations," as opposed to the "Subpart A" heading, "General Regulations," under which § 552.3 and § 552.6 are listed. This regulation exempted employees who the DOL concedes were not exempt prior to the 1974 amendments. *See* Employment of Domestic Service Employees, 39 Fed. Reg. 35, 382, 35,385 (proposed Oct. 1, 1974) (finding that "[e]mployees who are engaged in providing . . . companionship services and

who are employed by an employer other than the families or households using such services" were "subject to the [FLSA] prior to the 1974 Amendments"). Prior to the promulgation of § 552.109(a), the DOL put out a different proposed rule for notice and comment: one that specifically declined to apply the "companionship services" exemption to employees of third party employers. *See id.* Following notice and comment on that proposed regulation, the agency reversed its position and offered the following explanation: "On further consideration, [the Secretary of Labor] ha[s] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." Application of the Fair Labor Standards Act to Domestic Service, 40 Fed. Reg. 7404, 7405 (Feb. 20, 1975) (codified at 29 C.F.R. pts. 516, 552). The statement accompanying the regulation did not explain how bringing these previously covered employees of third party employers within the exemption furthered the congressional purpose of expanding, and not narrowing, FLSA coverage from what it had been prior to 1974. The DOL did not extend the exemption to apply to those employees employed by third parties that provide "babysitting services." *See* 29 C.F.R. § 552.109(b).

The DOL has enforced the two regulations at issue since their promulgation in 1974 and Congress has not disturbed the details of the scheme recounted here in the nearly thirty years they have been in force. In early 2001, however, the agency proposed amendments to the regulations pertaining to the "companionship services" exemption, which were subsequently abandoned. In proposing the amendments, the DOL stated:

> Due to significant changes in the home care industry over the last 25 years, workers who today provide in-home care to individuals needing assistance

> with activities of daily living are performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated. The number of workers providing these services has also greatly increased, and most of these workers are being excluded from the FLSA under the companionship services exemption. The Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section [2]13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of "companionship services," which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent.

See Application of Fair Labor Standards Act to Domestic Serivce, 66 Fed. Reg. 5481, 5482 (proposed Jan. 19, 2001). The DOL further explained what it understood to have been the congressional intent in 1974:

> [I]t clearly was Congress' intent under the 1974 FLSA Amendments to cover all workers who performed domestic services as a vocation, excluding casual babysitters and providers of companionship services who were not regular bread winners or responsible for their [own] families' support. . . . Personal and home care aides perform a variety of tasks in the home, including household work and assistance with nutrition and cleanliness. Employers have generally treated workers employed as home health aides and personal and home care aides as exempt companions, based upon the Department's current regulations. . . . As a result, the

> Department believes it is necessary to amend the regulations to focus them on fellowship and protection duties that Congress originally intended the companion exemption to cover.

Id. at 5483. The 2001 proposed amendments to the regulations would have extended FLSA protection to employees who are hired by "someone other than a member of the family in whose home he or she works." *Id.* at 5482. The DOL expressly acknowledged that there exists an internal inconsistency between § 552.109(a) and § 552.3 and that § 552.3 is more consistent with the congressional purpose as it existed in 1974. *Id.* at 5485. Nonetheless, without further addressing the inconsistency, the DOL withdrew the proposed amendments in April 2002 because "numerous comment[s] on the proposed rule, including [comments offered by] multiple government agencies . . . seriously called into question the Department's conclusion that there would be little economic impact." Application of the Fair Labor Standards Act to Domestic Service, 67 Fed. Reg. 16,668 (Apr. 8, 2002). Upon withdrawing the proposed amendments, the DOL did not question or otherwise comment upon its 2001 conclusion about what congressional intent had been in 1974.

IV. *The Enforceability of 29 C.F.R. § 552.6*

A. Degree of deference to accord to the DOL

The district court accorded *Chevron* deference to § 552.6's definition of "companionship services." Neither party in this case objects to this because the statute directed the DOL to promulgate legislative regulations to define the term "companionship services" as it appears in 29 U.S.C. § 213(a)(15), and the regulations are plainly an exercise of that authority. *See Mead*, 533

U.S. at 226-27 (clarifying that *Chevron* deference is appropriate when a statute clearly delegates authority to an agency and the agency acts purporting to exercise that authority); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002); 29 C.F.R. § 552.2(c) (expressly stating that "[t]he definitions required by § [2]13(a)(15) are contained in § 552.3, § 552.4, § 552.5 and § 552.6"). Accordingly, § 552.6 is binding on the courts unless procedurally defective, "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. Here, Coke argues that § 552.6 is unenforceable as being manifestly contrary to the statute.

In applying *Chevron* deference, we follow a two-step analysis: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. When the terms of a statute are unambiguous, the judicial inquiry is complete. However, if there is ambiguity in the statute, we proceed to step two and inquire whether the agency's legislative regulation is a reasonable and permissible construction of the statute. *Id.* at 843-44. "If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding." *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) (internal quotation marks omitted) (citing *Chevron*, 467 U.S. at 843 n.11). We are also mindful that "a long-standing, contemporaneous construction of a statute by the administering agenc[y] is entitled to great weight." *Leary v. United States*, 395 U.S. 6, 25 (1969) (internal quotation marks and citations omitted).

B. Application of *Chevron*

Coke argues that we needn't arrive at step two of the *Chevron* inquiry and that we should find that the statute plainly and on its face prohibits the agency's definition of "companionship services." In particular, she contends that the regulation's inclusion within the definition of both housework *related to* the care of the elderly or infirm and housework *incidental to* that care are violative of the statute's command to fashion an exemption only for "companionship services." Coke suggests that the large amount of incidental housework permitted by the current regulation (twenty percent of the work) is an abuse of the delegation under the statute. Indeed, she argues, under a particular reading of the regulation's second sentence (the one that allows work "related to" the care of the elderly or infirm), "household work" would be exempt even if no companionship were provided at all: "Under the regulation, an elderly person unable to care for him or herself could hire a full-time companion *and* a full-time cook, pay the cook less than the minimum wage, and successfully assert that cooking is a companionship service . . . ." Appellant's Br. at 16. Thus, because Congress clearly indicated that "companionship services" were meant to be a subset of domestic services, and the regulation can be read to exempt pure domestic service without companionship, Coke argues that the regulation was drawn too broadly on its face. Since Congress wanted to make sure domestic service employees got FLSA protection, she argues that § 552.6's extension of the exemption to "meal preparation, bed making, [and] washing of clothes" places too many domestic service employees within the exemption, a result that Congress could not have intended. The district court properly rejected these arguments.

The statute plainly gives the DOL authority to define "companionship services," a vague term with no obvious plain meaning; and the DOL did so very soon after the passage of the amendments to the FLSA. On the face of the statute, we discern no unambiguous congressional intent to keep all "incidental" services and domestic services "related to" the care of the elderly and infirm outside the exemption, especially when such services would naturally follow from or be part of a reasonable job description of a companion to the elderly or infirm.

Although the Supreme Court has issued mixed messages as to whether a court may consider legislative history at this stage of the analysis (step one of *Chevron*),[3] that history plainly presupposes that some incidental or other related housework would accompany "companionship." For example, Senator Quentin Burdick wanted to extend FLSA coverage for "professional domestic[s]" but was concerned about the potential burden on household employers where "people who might have an aged father, an aged mother, an infirm father, an infirm mother, and a neighbor comes in and sits with them. This, of course, entails some work, such as perhaps mak-

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[3] *Compare FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 137 (2000) (effectively considering legislative history at step one of *Chevron* analysis), *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697-99 (1991) (same), *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 649-50 (1990) (same), *and Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233-41 (1986) (same), *with K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 293 n.4 (1988) (opinion of Kennedy, J.) (noting in the first step of a *Chevron* inquiry that "any reference to legislative history [ ] is in the first instance irrelevant"), *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (finding statutory text clear enough to ignore any arguments from legislative history), *and Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 417 (1992) (finding only statutory text to be relevant for first-step *Chevron* analysis).

ing lunch . . . . This would be incidental to the main purpose of the employment." 119 Cong. Rec. 24,773, 24,801 (1973). Senator Harrison Williams explained the purpose of the "companionship services" exemption through an analogy to the "babysitting" exemption:

> We use the situation in which people are in a household not to do household work but are there, first, as babysitters. I think we all have the full meaning in mind of what a babysitter is there for—to watch the youngsters.
>
> "Companion," as we mean it, is in the same role — to be there and to watch an older person, in a sense.
>
> . . . .
>
> [Household work] which is purely incidental would not change the category of the person being there in the household.

Id. Without attaching primacy to using legislative history at step one, it seems to us more likely than not that Congress understood that when employees are in the home "first" to be companions or babysitters, they may engage in "incidental" housework without falling outside the exemption. The DOL's regulatory choice of the twenty percent allowance for incidental work is not clearly contravened by either the text of the statute or the intent of Congress to the extent it is discernable.

More troubling is the second sentence of the regulation, which is not delimited by the twenty percent rule. It does seem to allow, as Coke argues, virtually unlimited household work as long as it is "related to the care of the aged or infirm person." The DOL, however, in its amicus brief explains:

> Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable

> to care for himself in order to meet the requirements of the "companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person. *See* 29 C.F.R. § 552.6." Thus, contrary to [Coke's] suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations.

Br. of Amicus Curiae DOL at 19 (citations omitted). The DOL's explanation is adequate. At best, the regulation is ambiguous on the question of whether the first sentence of the regulation must be satisfied—that an employee must first provide "fellowship, care, and protection"—before proceeding to the inquiry about whether to exempt the "related" household work.

We note, however, that we have no occasion to limit the enforcement of § 552.6 to the DOL's litigation position here because Coke concedes that her challenge is to the regulation "on its face," that is, in all its applications. Coke has specifically refused to challenge the regulation "as applied" to any particular class of employees. We do not rule out the possibility of an application that would contravene the plain statutory mandate, but because there are many applications of the regulation that are consistent with the statute, we cannot declare it invalid on its face. *See generally Reno v. Flores*, 507 U.S. 292, 301 (1993) (extending the no-set-of-circumstances test for facial constitutional challenges to statutes under *United States v. Salerno*, 481 U.S. 739 (1987), to *Chevron* challenges). In any event, Coke presents no facts upon which we could conclude that the

agency has ever applied the regulation in the purportedly impermissible way she envisions.

If we refused to consider the unequivocal legislative history at step one of *Chevron*, the statute is at best ambiguous on the question of whether incidental services and household work related to the care of the individual may accompany the fellowship and companionship focus of the exemption.[4] And step two of *Chevron* requires us to inquire if the DOL's regulation "harmonizes with the language, origins, and purpose of the statute." *Bankers Life & Cas. Co. v. United States*, 142 F.3d 973, 983 (7th Cir. 1998). Consideration of legislative history is generally accepted at this stage of the analysis. *E.g.*, *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *Bankers Life*, 142 F.3d at 983.

Coke also argues that § 552.6 fails step two of *Chevron*. Coke repeats the arguments she makes in connection with step one and also focuses on Senator Burdick's statement in the legislative history that sums up the "companionship services" exemption as one targeted for "elder sitter[s]." *See* 119 Cong. Rec. at 24,801. Coke intimates that a sitter must only sit, without lifting a hand to help the elderly or infirm with incidental housework. But, again, we agree with the district court that

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[4] The DOL's 2001 statements do not prove that § 552.6 is unenforceable. First, the DOL's contemporaneous assessment of congressional intent is more probative: Apparently, the DOL thought § 552.6 represented congressional intent in 1974 and the enacting Congress expressed no discontent. Second, the DOL's interpretation of congressional intent, whether in 2001 or 1974, could never be dispositive for our *Chevron* inquiry. Of course, the entire purpose of the *Chevron* inquiry is to determine congressional intent quite apart from what the agency interprets that intent to be. Only if we conclude that the enacting Congress's intent is ambiguous do we defer to reasonable interpretations of the gap left by the ambiguity.

§ 552.6 survives the *Chevron* inquiry. The Senate Report, cited by Coke, makes clear that some incidental household work and housework related to the care of the elderly or infirm does not contravene the purpose of the exemption. *See* 119 Cong. Rec. at 24,801 (1973). The idea that a sitter merely sits is belied by Senator Burdick's analogy: Sitters provide care, and care entails other incidental tasks such as food preparation, feeding, cleaning up messes, changing diapers, and other services. Accordingly, given the deference afforded the agency under *Chevron*, we are unable to conclude that § 552.6 is arbitrary, capricious, or manifestly contrary to the statute with respect to either (1) the twenty percent allowance for incidental housework in the agency's legislative regulation, or (2) the agency's allowance for household work related to the care of the individual.

Every circuit to have considered the question of the enforceability of § 552.6 has found the regulation enforceable on its face. *See, e.g.*, *Johnston*, 213 F.3d at 565; *Salyer*, 83 F.3d at 787; *McCune*, 894 F.2d at 1110. Only *Harris*, 2001 U.S. Dist. LEXIS 23263, at *17, a district court decision from the Northern District of Illinois, found the regulation too broad. *Harris*, of course, in no way binds us. Moreover, *Harris* was an "as applied" case and its ultimate pronouncement was narrow. While it calls § 552.6 "unreasonably broad" in the text of the opinion, *id.* at *11, it is more circumspect when it announces its final holding: "§ 552.6, as currently drafted, is invalid *to the extent it exempts homemakers from [FLSA] coverage*," *id.* at *17 (emphasis added); only the particular case of the regulation "as applied" to homemakers—as the plaintiffs were in that case—was held to be outside the "companionship services" exemption.

In the case before us, however, because Coke does not tell us anything about what "home healthcare attendants" actually do, it is impossible for us to pass on the question of whether the particular work she did was considered by Congress to be outside the exemption. Consistent with her facial challenge to § 552.6, Coke refused to amend her complaint to be more specific about what she does. For the foregoing reasons, the regulation withstands *Chevron* deference on this challenge. Accordingly, we AFFIRM the district court's ruling with respect to the enforceability of § 552.6.

V. *The Enforceability of 29 C.F.R. § 552.109(a)*

We now turn to Coke's challenge to § 552.109(a), which applies the exemption to "companionship services" rendered by those who are employed by third parties, rather than by the family of the recipient of the services.

A. Degree of deference to accord to the DOL

The threshold question concerning § 552.109(a)'s enforceability is the degree of deference to be afforded the DOL. Coke argues that the district court erred by according *Chevron* deference to the regulations that the DOL itself calls "interpretations." The DOL argues that such deference was appropriate. Although the district court did not directly consider the question, it is purely one of law, which we consider *de novo*. *See Ossen*, 361 F.3d at 764.

In favor of applying *Chevron* deference is *Chevron*'s own broad statement and *Mead*'s endorsement of that statement:

> When Congress has "explicitly left a gap for an agency to fill, there is an express delegation of

> authority to the agency to elucidate a specific provision of the statute by regulation," and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.

Mead, 533 U.S. at 227 (citation omitted) (quoting *Chevron*, 467 U.S. at 843-44). Thus, to the extent that the statute is silent on the definition of a "domestic service employee" and contains no reference to third party employers, such matters might be understood to be appropriately delegated to the DOL. An agency interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27 (emphasis added). The statute, 29 U.S.C.§ 213(a)(15), expressly delegated authority to the DOL to define and delimit the terms "companionship services" and "domestic service employee," and the DOL argues that *Chevron* deference follows accordingly.

Moreover, the regulation at issue is "a long-standing, contemporaneous construction of a statute," and, as such, "entitled to great weight." *Leary*, 395 U.S. at 25 (internal quotation marks omitted). Indeed, Congress has revisited 213 by amending it seven times since 1974, without expressing any disapproval of the DOL regulation at issue, *see* Pub. L. No. 95-151 (1977); Pub. L. No. 96-70 (1979); Pub. L. No. 101-157 (1989); Pub. L. No. 103-329 (1994); Pub. L. No. 104-88 (1995); Pub. L. No. 104-188 (1996); Pub. L. No. 105-78 (1997). Such congressional acquiescence is "persuasive evidence that the [agency] interpretation is the one intended by Congress."

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 846 (1986).[5]

Finally, when an agency action is " 'the fruit[ ] of notice-and-comment rulemaking or formal adjudication,' " courts generally accord the agency *Chevron* deference. *Chao*, 291 F.3d at 227 (quoting *Mead*, 533 U.S. at 230). Here, no one contests that, although the agency calls § 552.109(a) an "interpretation," it was promulgated following notice and comment procedures. However, it is also true (and a cause of concern) that the rule the agency adopted after comments were received was the opposite of the rule proposed in the original notice. There was no separate notice and comment on the rule as ultimately adopted.

All courts that have considered § 552.109(a) have accorded it *Chevron* deference. *See, e.g.*, *Johnston*, 213 F.3d at 561-62; *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d at 1299 n.2. But Coke is correct that none of these prior cases carefully considered the question before us now: Does *Mead*, which post-dates the cases affording § 552.109(a) *Chevron* deference, require a dif-

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[5] The argument from congressional acquiescence—affectionately known as the "dog didn't bark canon"—must always be qualified by the observation that evidence of what subsequent Congresses intend pales in comparison to probative evidence about what the enacting Congress intended; even *Schor* did not rely on what it called the "silence" rule. 478 U.S. at 846. *See generally* William N. Eskridge, Jr. et al., *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 1020-21 (3d ed. 2001) (discussing the "dog didn't bark canon"). Furthermore, because Congress, in amending 213, never reenacted the FLSA or the relevant provisions thereof, this is not a case that implicates the "re-enactment rule" delineated in *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), where "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it reenacts a statute without [relevant] change."

ferent analysis yielding a different result insofar as it holds that some agency regulations should be accorded less than *Chevron* deference?

Coke argues that *Mead* requires us to apply a lesser degree of deference to § 552.109(a) as an "interpretive," rather than a "legislative" regulation. Indeed, "interpretive rules . . . enjoy no *Chevron* status as a class." *Mead*, 533 U.S. at 232.

This circuit, even before the Supreme Court's clarification in *Mead*, contemplated that interpretive regulations should not receive full *Chevron* deference. In *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), we considered DOL regulations promulgated to define and delimit the administrative exemption in the FLSA at 29 U.S.C.§ 213(a)(1). We held, "In contrast to the controlling authority given the [DOL's] *legislative* rules—i.e., those promulgated pursuant to an express grant of Congressional authority—the respect accorded the [DOL's] *interpretive* regulations depends upon their persuasiveness . . . ." *Id.* We foretold the precise distinction later drawn in *Mead* when that Court distinguished between those regulations that are accorded *Chevron* deference and those that are not. In *Reich v. New York*, the interpretations from which *Chevron* deference was withheld were classified as "interpretations" by the regulations themselves. *See also Freeman*, 80 F.3d at 83-84 (refusing to accord *Chevron* deference to DOL interpretations under the FLSA despite their promulgation with notice and comment procedures); *Reich v. Gateway Press, Inc.*, 13 F.3d 685, 699 n.18 (3d Cir. 1994) ("The DOL interpretations do not have the force of law.").

We find § 552.109(a) to be an interpretive rather than a legislative regulation. While the rule "grants rights, imposes obligations, or produces other significant effects on private interests," as legislative regulations do, *White*

v. Shalala, 7 F.3d 296, 303 (2d Cir. 1993) (internal quotation marks omitted), a rule can only be legislative "if the agency intended to use [the legislative power delegated to it by Congress] in promulgating the rule at issue," *American Postal Workers Union, AFL-CIO v. United States Postal Serv.*, 707 F.2d 548, 558 (D.C. Cir. 1983). Here, the DOL did not intend to use the legislative power delegated in§ 213(a)(15) when it promulgated § 552.109(a). This is most apparent from its inclusion of the regulation under "Subpart B-Interpretations" as opposed to "Subpart A-General Regulations." This appearance is supported by substance.

Congress expressly delegated to the DOL authority to define terms in§ 213(a)(15), and the DOL expressly states in 29 C.F.R. § 552.2(c) that "[t]he definitions required by [2]13(a)(15) are contained in § 552.3, § 552.4, § 552.5 and § 552.6." Accordingly, the regulation at issue, § 552.109(a), is effectively conceded by the DOL not to have been promulgated pursuant to Congress's express legislative delegation in§ 213(a)(15). *Mead* holds that administrative implementation of a particular statutory provision does not qualify for *Chevron* deference unless "it appears that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226-27. Thus, § 552.109(a) does not qualify for *Chevron* deference because, by the DOL's own account, it was self-consciously not promulgated in exercise of Congress's delegated authority pursuant to§ 213(a)(15).

The DOL places emphasis on the fact that in 1974 § 552.109(a) was promulgated after notice and comment and, indeed, *Mead* explicitly instructs us to consider whether a rule was the product of notice and comment in assessing whether to accord it *Chevron* deference. *Mead*, 533 U.S. at 230-31. However, "while notice and com-

ment are required for legislative rules, they are by no means prohibited for interpretive rules." *Mejia-Ruiz v. INS*, 51 F.3d 358, 365 (2d Cir. 1995). *Mead* does nothing to undermine this conclusion. *See Mead*, 533 U.S. at 230-31; Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 Admin. L. Rev. 807, 814 (2002) ("I do not think the Court was saying [in *Mead*] . . . that if an agency adopts notice-and-comment or trial-type hearing procedures *on its own authority*, its interpretation is presumptively entitled to *Chevron* deference." (emphasis removed and emphasis added; citations omitted)).

In this case, the agency undertook a notice and comment procedure for an interpretative regulation despite the fact that the procedure was not required. While *Mead* does not offer specific guidance on whether putting a proposed interpretation out for notice and comment has any effect on deference, following the notice and comment procedure, at most, buttresses a claim that the agency gave consideration to what it did; it does not alter the fact that the agency did not act pursuant to legislative authority.

In any event, here we cannot ignore that the notice and comment procedure for § 552.109(a) was at best idiosyncratic and at worst insufficient. The original notice informed the public that employees of third party employers were *not* going to be exempt from the FLSA (consistent with § 552.3), *see* 39 Fed. Reg. 35,385 (proposed Oct. 1, 1974), but the final rule provided exactly the opposite without a detailed explanation, *see* 40 Fed. Reg. 7405 (Feb. 20, 1975). Because we conclude that § 552.109(a) is interpretative, and thus need not have conformed with notice and comment procedures, we have no occasion to decide whether this regulation is invalid under the Administrative Procedure Act, 5

U.S.C. 553(b)(3)(A). *Cf. Nat'l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2d Cir. 1986) ("[I]f the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.") (internal quotation marks omitted). Nevertheless, we decline the DOL's invitation to bootstrap an entitlement to *Chevron* deference for an interpretative regulation from this substandard notice and comment procedure.[6]

While we agree with Coke that § 552.109(a) does not command *Chevron* deference, *Mead* nevertheless requires us to afford the agency some level of deference with the vague prescription to "tailor deference to variety," 533 U.S. at 236. We believe that *Skidmore* deference based upon the regulation's "power to persuade" is the appropriate level of deference to be applied where, as here, "the agency has some special claim to expertise under the statute." Merrill, *supra*, at 812. To the extent that the regulation represents "more specialized experience and broader investigations and information" available to the agency, we will defer to reasonable regulations. *Skidmore*, 323 U.S. at 139-40; *see also Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inap-

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[6] Merrill finds "interpretive regulations adopted after notice-and-comment procedures" to be within an "area of uncertainty" after *Mead* for lower courts trying to determine whether to apply *Chevron* deference. Merrill, *supra*, at 821. *But see* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 Geo. Wash. L. Rev. 347, 350 (2003) (treating notice and comment procedures as affording the agency a "safe harbor" entitlement to *Chevron* deference). We needn't choose between Merrill and Vermeule here because even if Vermeule is right, special circumstances surrounding the notice and comment procedures here militate against furnishing the agency with a safe harbor.

plicable). In determining its "power to persuade," we look to § 552.109(a)'s "consisten[cy] with the congressional purpose," *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); its consistency with other regulations, *see Skidmore*, 323 U.S. at 140; the "consistency of the agency's position" over time, *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); the "thoroughness evident in [the agency's] consideration"; and the "validity of its reasoning," *Skidmore*, 323 U.S. at 140.

B. Application of *Skidmore*

Considering the regulation's persuasiveness under *Skidmore*'s less deferential standard, we agree with Coke that § 552.109(a) is unenforceable. The regulation is inconsistent with Congress's likely purpose in enacting the 1974 amendments; inconsistent with other regulations (which themselves deserve *Chevron* deference); and inconsistent with other agency positions over time. Moreover, the agency does not proffer valid reasoning for § 552.109(a)'s enforceability, evidencing a lack of thorough consideration.

(1) Congressional purpose

When Congress sought to amend the FLSA in 1974, it desired to expand FLSA coverage to "domestic service employees," and to exempt from coverage only those "domestic service employees" engaged in "companionship services." At the time, persons who were employed by a third party were outside the category of "domestic service employees" and were protected by the FLSA before the 1974 amendments. *See Homemakers Home & Health Care Servs., Inc. v. Carden*, 538 F.2d 98 (6th Cir. 1976); 39 Fed. Reg. 35,385 (Oct. 1, 1974) (DOL finding that "[e]mployees who are engaged in providing . . . companionship services and who are employed by an

employer other than the families or households using such services . . . [were] subject to the [FLSA] prior to the 1974 Amendments"); 66 Fed. Reg. 5485 (Jan. 19, 2001). *See generally* Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev. 113, 117 (2003). It is implausible, to say the least, that Congress, in wishing to expand FLSA coverage, would have wanted the DOL to eliminate coverage for employees of third party employers who had previously been covered.

(2) Consistency with other regulations and through time

Section 552.109(a) is also jarringly inconsistent with other regulations the DOL itself promulgated under the FLSA immediately following the 1974 amendments. In 29 C.F.R. § 552.3, the DOL defined the term "domestic service employment" to refer "to services of a household nature performed by an employee in or about a private home (permanent or temporary) *of the person by whom he or she is employed*." 29 C.F.R. § 552.3 (emphasis added). Unlike § 552.109(a), this regulation was legislative, issued pursuant to§ 213(a)(15) and, thus, entitled to *Chevron* deference. *See* 29 C.F.R. § 552.2(c) ("[t]he definitions required by [213(a)(15)] are contained in [ ]§ 552.3"). Plainly, under § 552.3, employees employed by third parties do not qualify for the exemption. Indeed, § 552.3 tracks the relevant legislative history that the DOL would have reasonably taken as its guidance. *See* H.R. Rep. No. 93-913, at 35 ("the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home *of the person by whom he or she is employed*" (emphasis added)). Thus, the stark internal

inconsistency between § 552.109(a) and § 552.3, when coupled with the latter's entitlement to greater deference and its greater consistency with congressional purpose, strongly counsels against enforcement of § 552.109(a).

Moreover, the agency's position with regard to FLSA coverage through time has hardly been a model of consistency. We have recounted above how, in 1974, the agency proposed a regulation that would have afforded FLSA coverage to employees of third party employers only to reverse itself with the promulgation of § 552.109(a). In 2001, the DOL again proposed that employees of third party employers get FLSA coverage (contrary to the view it endorses in this litigation), only to withdraw the proposal shortly thereafter based on economic considerations that have no bearing on the more relevant question of what Congress intended in 1974.

(3) Validity of the DOL's reasoning

Finally, the DOL's inadequate reasoning in support of the regulation is matched by its failure to exhibit thoroughness in its consideration. Two omissions are particularly notable. First, the DOL offered virtually no explanation for the direct inconsistency between § 552.109(a) and § 552.3. Second, the DOL has not adequately explained—either in the Federal Register or in its submissions to this court —what accounted for the about-face after putting the regulations out for notice and comment in 1974, resulting in third party employers, for the first time, being entitled to claim the exemption. *Compare* 39 Fed. Reg. 35,385 (proposing a regulation on October 1, 1974 that retained the FLSA coverage of employees of third party employers), *with* 40 Fed. Reg. 7405 (adopting a regulation on Feb. 20, 1975 allowing such employees to be subject to the exemption). While the Federal Register recited that "[o]n further consid-

eration, [the Secretary of Labor] ha[s] concluded that the ['companionship services'] exemption can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services," 40 Fed. Reg. 7404, the DOL ignored the plain language of the statute, which precluded an interpretation that the exemption could apply to "any" employee; on its face, it may apply only to employees in "domestic service employment." 29 U.S.C.§ 213(a)(15); *see also* 29 C.F.R. § 552.3 (defining "domestic service employment" to preclude employees of third party employers).

The agency's reasoning has not improved with time. Acknowledging the internal contradiction between § 552.109(a) and § 552.3 in its brief, the DOL today is reduced to asserting that we should uphold the regulation because other courts have done so. This is hardly an argument. As we have explained, the decisions relied upon by the DOL were all prior to the Supreme Court's *Mead* decision, based on which we hold that *Chevron* deference is inapplicable to § 552.109(a). Thus, no other court has considered § 552.109(a) under the proper *Skidmore* level of deference and carefully analyzed the regulation's "power to persuade" in accordance with the factors appropriate to *Skidmore*'s inquiry.

Accordingly, finding that § 552.109(a) cannot survive *Skidmore* analysis, we decline to enforce it. We hereby VACATE the judgment of the district court upholding it, and REMAND the case for further consideration consistent with this opinion.

CONCLUSION

For all the foregoing reasons, we AFFIRM the district court's ruling that 29 C.F.R. § 552.6 is enforceable on its face; VACATE the district court's ruling that 29 C.F.R. § 552.109(a) is enforceable; and REMAND the case for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshal United States Courthouse, Foley Square, in the City of New York, on the 10th day of January two thousand five.

COKE

—v.—

LONG ISLAND CARE

Filed January 10, 2005
03-7666-cv

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the defendants-appellees Long Island Care, et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in

regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,

Roseann B. MacKechnie, Clerk

By: [ILLEGIBLE]
Motion Staff Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

COKE

—v.—

LONG ISLAND CARE AT HOME, LTD.

MOTION INFORMATION STATEMENT

Docket Number(s): 03-7666

Motion for: Stay of the Mandate

Set forth below precise, complete statement of relief sought:

Stay of the mandate for 90 days pending application to the Supreme Court for certiorari review.

MOVING PARTY: Long Island Care at Home Ltd., & Maryann Osborne

☐ Plaintiff ☒ Defendant

☐ Appellant/Petitioner ☒ Appellee/Respondent

MOVING ATTORNEY: Daniel S. Alter, Esq.
[name of attorney, with firm, address, phone number and e-mail]

c/o Alter & Alter
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 867-7777
danny.alter@verizon.net

OPPOSING PARTY: Evelyn Coke

OPPOSING ATTORNEY [Name]: Harold Craig Becker, Esq.
[name of attorney, with firm, address, phone number and e-mail]

(lead counsel)
Services Employees International Union
25 East Washington, Suite 1400
Chicago, IL 60602

Court-Judge/Agency appealed from: Hon. Thomas A. Platt, Eastern District of New York

Please check appropriate boxes:

Has **consent** of opposing counsel:

A. been sought? ☐ Yes ☒ No

B. been obtained? ☐ Yes ☒ No

Is **oral argument** requested? ☐ Yes ☒ No
(requests for oral argument will not necessarily be granted)

Has **argument** date of appeal been **set?** ☐ Yes ☐ No
If yes, enter date N/A

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made **below**? ☐ Yes ☐ No
N/A

Has this relief been previously sought in this Court? ☐ Yes ☒ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

DANIEL S. ALTER Date: January 17, 2005

Has **service** been effected? ☐ Yes ☐ No

ORDER

Before:

Hon. John M. Walker, Jr., *Chief Judge*,
Hon. Robert A. Katzmann, *Circuit Judges*,
Hon. John Gleeson, *District Judge**

IT IS HEREBY ORDERED that the motion by appellee to stay mandate pending application to the Supreme Court for certiorari review is GRANTED.

March 22, 2005
Date

FOR THE COURT:

ROSEANN B. MACKECHNIE, Clerk
by

TRACY W. YOUNG
Tracy W. Young
Motions Staff Attorney

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* The Honorable John Gleeson of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix B

UNITED STATES DISTRICT COURT
E.D. New York

No. 02-CV-2010(TCP)(ARL)
May 23, 2003

EVELYN COKE, individually and on behalf of others similarly situated,

Plaintiff,

—v.—

LONG ISLAND CARE AT HOME, LTD. and Maryann Osborne,

Defendants.

Leon Greenberg, New York City, for Evelyn Coke, individually and on behalf of others similarly situated, Plaintiff.

Arnold S. Klein, Meltzer, Lippe & Goldstein, LLP, Mineola, NY, for Long Island Care at Home, Ltd., Maryann Osborne, Defendants.

MEMORANDUM AND ORDER

Platt, District Judge.

Defendants Long Island Care At Home, Ltd. ("LIC") and Maryann Osborne ("Osborne")(collectively "Defendants") move for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

Plaintiff Evelyn Coke ("Coke" or "Plaintiff") opposes the motion and also moves for the circulation of a Notice of Pendency and a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b). This Court heard oral arguments on April 2, 2003.

At issue is whether certain regulations promulgated by the Department of Labor ("DOL") pursuant to the Federal Fair Labor Standards Act, 29 U.S.C. § 201 *et. seq.* (the "FLSA") are legally enforceable. At oral argument Plaintiff's counsel clarified that Plaintiff could not meet the requirements of the relevant regulations as written and that the purpose of this action was to determine the validity of such regulations.[1] (Tr. at 2-5.) As set forth below, because the Court finds that the DOL's regulations are proper Defendants' Motion is GRANTED.

BACKGROUND

A. Factual Background

Plaintiff is a resident of the State of New York, County of Queens, and a former employee of Defendants. LIC is a corporation formed pursuant to the laws of New York State. Osborne is the owner and sole shareholder, as well as a director and officer of LIC.

The pleadings provide little factual background.[2] According to the Complaint, Plaintiff has been employed by Defendant since 1997 and that "her occupations include, but are not limited to, work as a home health-

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[1] References to the transcript of the April 2, 2003 are cited as Tr. at ___.

[2] While the Plaintiff has provided more details of her employment in an affidavit, the Court may not consider such statements when deciding a Rule 12(c) motion.

care attendant." (Compl. at 10.) Plaintiff contends that despite working more than 40 hours a week she never received overtime payments and that her hourly wage was less the minimum wage outlined in the FLSA.

B. Plaintiff's Claims

Plaintiff has asserted two claims in her Complaint. The First Claim is brought under the FLSA on behalf of Plaintiff and any other persons who consent in writing to join this action pursuant to 29 U.S.C. § 216(b). Plaintiff contends that she was entitled to, but was not paid, minimum wages and an overtime hourly wage of time and one-half for all hours worked in excess of forty hours per week. Plaintiff's Second Claim is brought under the Labor Law of the State of New York and the New York Minimum Wage Act ("NYMWA"), on behalf of Plaintiff and all persons similarly situated. The nature of the claims are identical to those under the First Claim. As relief, Plaintiff requests a judgement for unpaid overtime wages and minimum wages, liquidated damages, attorney's fees, interest and costs as provided for by the FLSA.

Defendant has asserted nine affirmative defenses, including that, workers such as Plaintiff are exempt from eligibility for minimum wage and overtime compensation under the FLSA and the FLSA's implementing regulations.

At oral argument, the Court inquired of Plaintiff's counsel whether he could amend the Complaint to sufficiently allege a cause of action under the FLSA and the regulations promulgated thereunder. Counsel indicated that he could not. (Tr. at 2-5.)

DISCUSSION

A. Rule 12(c) Standard

Rule 12(c) provides that,

> [a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgement on the pleadings, pursuant to Fed.R.Civ.P. 12(c) is appropriate where material facts are undisputed and a judgment on the merits is possible merely by considering the contents of the pleadings. *See Mennella v. Office of Court Admin.*, 938 F.Supp. 128, 131 (E.D.N.Y.1996) (Spatt, J.) (citing *Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 642 (2d Cir.1988)). "In considering a motion for a judgment on the pleadings, the Court must accept as true all of the non-movant's well pleaded factual allegations, and draw all reasonable inferences in favor of the non-movant." *Id.* (citing *Davidson v. Flynn*, 32 F.3d 27, 29 (2d Cir.1994)).

B. The FLSA Generally

The FLSA of 1938 was enacted for the purpose of regulating minimum wages, maximum working hours, and child labor in industries within interstate commerce. While the FLSA sought to protect some of the nation's

lowest paid workers, it did not apply to all employees. Since 1938, Congress has extended the FLSA's coverage to many other low-paying occupations through periodic amendments.

Among these extensions of coverage were the amendments of 1974, in which Congress extended coverage to employees in "domestic service." Through the 1974 amendments Congress intended to "not only raise the wages of these workers but [to] improve the sorry image of household employment." H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in,* 1974 U.S.Code Cong. & Admin. News 2811, 28-43. The 1974 amendments made domestic service employees subject to the minimum wage and maximum working hours requirements of the FLSA.

The 1974 amendments Congress do provide for a limited exemption from the FLSA for certain domestic service employees, as set forth in 29 U.S.C. § 213(a)(15) ("Section 213(a)(15)"). Section 213(a)(15) provides, in pertinent part, that the provisions minimum wage and maximum hour requirements of Sections 206 and 207 of the FLSA shall not apply to,

> (15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (***as such terms are defined and delimited in the regulations of the Secretary***). (emphasis added).

Pursuant to this Congressional delegation of authority, the DOL promulgated 29 C.F.R. § 552.6 ("Section 552.6") which defines "companionship services." It states, in pertinent part,

> the term companionship services shall mean those services which provide fellowship, care and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general housework: Provided however, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked.

In discussing the policy reasons for the "companionship services" exemption the Ninth Circuit has stated, "[w]e are informed that these critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA". *McCune v. Oregon Senior Services Division,* 894 F.2d 1107, 1110 (1990).

"Domestic service" itself is not defined in the FLSA. However, the legislative history of the 1974 amendments state,

> the generally accepted meaning of domestic service relates to services of a household nature performed by an employee in or about a private home of the person by whom he or she is employed. The domestic service must be performed in a private home which is a fixed place of abode of the individual or family . . . [g]enerally, domestic service in and about a private home includes services performed by persons employed as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family

use. H.R.Rep. No.93-913, 93rd Cong., 2d Sess., reprinted in (1974) U.S.Code Cong. & Ad.News 2811, 2845.

The legislative history also "reveals that Congress used the term 'domestic service employment' interchangeably with the terms 'domestic service in households,' 'private household workers,' and 'household employment.' " *Lott v. Rigby,* 746 F.Supp. 1084, 1088 (N.D.Ga.1990) (citing H.R.Rep. No. 913, 93rd Cong., 2nd Sess., *reprinted in,* 1974 U.S.Code Cong. & Admin. News 2811, 2842-2843).

The DOL has incorporated the legislative history into 29 C.F.R. § 552.3 ("Section 552.3") which states that domestic service "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3. Importantly however, through 29 C.F.R. § 552.109(a) ("Section 552.109(a)") the DOL extends the exemption to "[e]mployees who are engaged in providing companionship services, as defined by § 552.6, and ***who are employed by an employer or agency other than the family or household using their services.***" 29 C.F.R. § 552.109(a) (emphasis added.)

C. Validity of Sections 552.6 and 552.109(a)

Plaintiff argues that both of these regulations are inconsistent with Congress's intent of extending coverage of the FLSA to domestic service employees. Specifically, Plaintiff argues that the definition of "companionship services" in Section 552.6 is overbroad and that Section 552.109(a) improperly extends the

exemption to employees who are employed by an agency.[3]

In regards to Section 552.109(a), Plaintiff asserts that prior to the 1974 amendments home healthcare employees employed by certain agencies would have been covered by "enterprise coverage" as set forth in 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a), which extends FLSA coverage to all employees of businesses that exceed a certain gross revenue. Plaintiff cites *Homemakers Home and Health Care v. Carden,* 538 F.2d 98 (6th Cir.1976) to support her position. In that case the Sixth Circuit upheld a stipulated finding of fact that the plaintiff, who was a home health care services company, was subject to FLSA enterprise coverage. Plaintiff reasons that in enacting the 1974 amendments Congress intended to extend coverage to domestic services employees, and not to remove coverage already provided to employees employed by FLSA "enterprises." (Pl. Suppl. Mem. at 8.)

Nearly all courts, however, have upheld both of these regulations. *See e.g., McCune v. Oregon Senior Services Division,* 894 F.2d 1107 (1990) (upholding Section 552.6); *Salyer v. Ohio Bureau of Workers' Compensation,* 83 F.3d 784 (6th Cir.1996) (same); *Johnston v. Volunteers of America, Inc.,* 213 F.3d 559 (10th Cir.2000) (upholding Section 552.109). One recent district court

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[3] Subsequent to oral argument, the Court invited the parties to submit additional materials related to the legislative history of the 1974 amendments. Plaintiff's supplemental materials, in part, raised for the first time the issue of whether 552.109 was procedurally invalid due to an alleged failure to comply with the Administrative Procedures Act, 5 U.S.C. § 553. Because this argument was not raised until several weeks after oral argument, does not appear in the Complaint or Plaintiff's initial brief, and was outside the scope of the Court's invitation, this argument was not considered by the Court.

decision is to the contrary. *See Harris v. Dorothy L. Sims Registry,* 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001). The Second Circuit has never expressly ruled on these issues.

The Supreme Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations" has consistently been followed. *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If there is "statutory ambiguity and the agency's interpretation is reasonable, its interpretation must receive deference." *Yellow Transp., Inc. v. Michigan,* 537 U.S. 36, 123 S.Ct. 371, 378, 154 L.Ed.2d 377 (2002) (citing *Chevron,* 467 U.S. at 844, 104 S.Ct. 2778). "[L]egislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.*

In deciding whether a regulation is reasonable, the Supreme Court has stated,

> [w]e ask first whether 'the intent of Congress is clear' as to 'the precise question at issue.' If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.' But 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer 'the court would have reached if the question initially had arisen in a judicial proceeding.' *Regions Hos-*

pital v. Shalala, 522 U.S. 448, 457, 118 S.Ct. 909, 139 L.Ed.2d 895 (1998) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)).

Moreover, "a long-standing, contemporaneous construction of a statute by the administering agencies is 'entitled to great weight.' " *Leary v. United States*, 395 U.S. 6, 25, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) (citations omitted). Where an agency changes its interpretation, "a revised interpretation deserves deference because 'an initial agency interpretation is not instantly carved in stone' and 'the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.' " *Rust v. Sullivan*, 500 U.S. 173, 186, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (citing *Chevron*, 467 U.S. at 862-864, 104 S.Ct. 2778).[4]

Both Sections 552.6 and 552.109(a) were promulgated in 1975, soon after the 1974 amendments and have been in effect for over twenty-eight years and are therefore entitled to great weight. The DOL did propose amendments to both regulations in January 2001, but those pro-

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[4] In addition, the Supreme Court has held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC v. Schor*, 478 U.S. 833, 846, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974)). Here Congress has amended Section 213 seven times since 1974. *See* Pub.L. 95-151 (1977); Pub.L. 96-70 (1979); Pub.L. 101-157 (1989); Pub.L. 103-329 (1994); Pub.L. 104-88 (1995); Pub.L. 104-188 (1996); Pub.L. 105-78 (1997).

posed amendments were withdrawn in 2001. In proposing to amend Section 552.6, the DOL stated,

> [t]he Department has reevaluated the regulations and determined that—as currently written—they exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 13(a)(15). Therefore, the Department proposes to amend the regulations to revise the definition of 'companionship services,' which sets out the duties that a companion must be employed to perform in order to qualify for the exemption, to more closely mirror Congressional intent. *Federal Register,* Vol. 66, No. 13 (January 19, 2001).

The DOL's proposals emphasized that the proposed amendments were proper due to the significant changes in the home care industry since 1974 and that home care employees are "performing types of duties and working in situations that were not envisioned when the companionship services regulations were promulgated." *Id.* After reviewing the legislative history, the DOL stated that the 1974 amendments were intended "to include all employees whose vocation was domestic service, but to exempt from the coverage babysitters and companions who were not regular bread winners or responsible for their families' support." *Id.*

In proposing to amend Section 552.6, the DOL stated that, "companionship services cannot be so broad as to include someone who essentially is serving as a maid or household worker." *Id.* The DOL then proposed three possible changes of the definition of "companionship services." All three of the proposals increased the emphasis on fellowship as a "critical component of a companion's duties." *Id.*

In proposing to alter Section 552.109(a), the DOL intended to make the exemptions of Section 213(a)(15) applicable "only with respect to the family or household using the worker's services." *Id.* Under the proposal, if an employee was hired by someone other than a member of the family in whose home he or she works, the employee would be covered by FLSA. *Id.* In this proposed amendment, the DOL noted that there was an internal consistency between Section 552.109(a), which allows employees of agencies to be exempt, and Section 552.3, fashioned from the legislative history, which states that domestic service employment must be "in or about" the private home of the employer. *Id.* Moreover, evidently in reference to "enterprise coverage", the DOL stated that since "[a]nyone who prior to 1974 had worked for a covered placement agency, for example, but who was assigned to work in someone's home, would have been covered previously by the FLSA," it was unlikely that Congress would have sought to change the status of employees who were already covered. *Id.*

In April 2002, the DOL withdrew the proposed amendments because "numerous commenters on the proposed rule, including multiple federal agencies . . . seriously called into question the Department's conclusion that there would be little economic impact." *Federal Register,* Vol. 67, No. 67 (April 8, 2002). After reviewing the "rulemaking record as a whole," the DOL terminated the proposal. *Id.*

After the proposed amendments were issued, but before they were withdrawn, one district court did find that the definition of "companionship services" set forth in Section 552.6 was unreasonably broad. In *Harris v. Dorothy L. Sims Registry,* 2001 WL 78448, 2001 U.S. Dist. LEXIS 23263 (N.D.Ill.2001), the court found that although an agency's interpretation of a statute is pre-

sumptively valid, "courts may not follow agency regulations that are inconsistent with congressional intent." *Id.*, 2001 WL 78448, *2, 2001 U.S. Dist. LEXIS 23263 at *8 (citing *Chevron*, 467 U.S. at 845, 104 S.Ct. 2778). In coming to its conclusion, the court relied heavily on the proposed amendments.

Applying the standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the *Harris* court first found that Section 213(a)(15) of the FLSA was ambiguous, since there was more than one reasonable interpretation of "companionship services." The plaintiffs in *Harris* argued that the term "referred to employees hired primarily to act as a companion for the elderly." *Harris*, 2001 WL 78448, *3, 2001 U.S. Dist. LEXIS 23263 at *9-*10. Defendants contended that the term meant "being with someone to help them with their extreme needs." *Id.*

After finding Section 213(a)(15) ambiguous, the *Harris* court then considered whether Section 552.6 was consistent with the language, origins and purpose of the statute. In this stage of the analysis, the court first considered the legislative history, from which it found, "[i]t is clear the senators did not intend to exempt employees whose primary job responsibilities went beyond fellowship and protection." *Id.*, 2001 WL 78448, *4, 2001 U.S. Dist. LEXIS 23263 at *12. After a review of the DOL's proposed amendments the court found "it is obvious from the proposed amendments that the DOL agrees that the current definition of 'companionship services' under § 552.6 is unreasonable" and that this "alone is sufficient reason to disregard the current version of § 552.6." *Id.*, 2001 WL 78448, *5, 2001 U.S. Dist. LEXIS 23263, at *17. Based on the legislative history and the proposed amendments, the court in *Harris* held

that Section 552.6 was invalid, "to the extent it exempts homemakers from [FLSA] coverage."[5] *Id.*

Prior to *Harris,* all other courts had upheld the validity of the regulations. In *McCune v. Oregon Senior Services Division,* 894 F.2d 1107 (1990) the Ninth Circuit held that the DOL's definition of "companionship services" in Section 552.6 was not contrary to the FLSA and affirmed the district court's granting of summary judgment in favor of defendants.

The plaintiffs in *McCune* were live-in attendants for elderly and infirm individuals unable to care for themselves. The Ninth Circuit, noting the strong deference which is accorded to agencies entrusted to define a specific provision of a statute, held that the 20% limit on general household work was reasonable and upheld the district's courts finding that any household work "related" to the care of the individual would not be counted towards the 20% threshold. In coming to this conclusion, the court quoted parts of the legislative history of the FLSA, which stated:

> The fact that a person performing casual services as baby-sitters or services as companions do some incident of household work does not keep them from begin casual baby-sitters or companions for purposes of this exclusion.

McCune, 894 F.2d 1107, 1111 (quoting H.R.Rep. No. 913, 1974 U.S.Code Cong. and Ad. News at 2845).

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[5] In *Harris,* although the finding that § 552.6 was invalid mooted the argument that domestic employees hired by agencies should not be exempt, the court did note that Section 552.109(a) was also proposed to be amended for similar reasons Section 552.6 was proposed to be amended. *Id.*, 2001 WL 78448, *5, n. 8, 2001 U.S. Dist. LEXIS 23263, at *17, n. 8.

In dissent in *McCune*, Judge Pregerson did "not propose challenging the agency's interpretation of its mandate when it promulgated section 552.6," but argued that the majority had improperly applied the regulation to the plaintiffs in that case. *McCune*, 894 F.2d at 1114. Judge Pregerson felt that the court should analyze whether the work performed by plaintiffs was actually "incidental" or whether it was only related to the care of their clients. As Judge Pregerson stated, "[t]hough simple laundry work might be 'incidental', what of bed-pan duty, catheterization, and soiled garments for bed-ridden invalids? These duties are certainly related to the care of the attendant's clients, but are by no means incidental." *Id.*

Courts have similarly upheld Section 552.109(a). Most recently, in *Johnston v. Volunteers of America, Inc.*, 213 F.3d 559 (10th Cir.2000), the Tenth Circuit rejected plaintiffs' claims that they were entitled to overtime pay under the FLSA because they were not employed by the individual receiving the care. Finding that Section 552.109(a) was not "arbitrary, capricious, or manifestly contrary to § 213(a)(15)", the Court held that "the fact that domestic service employees are not employed by the individual receiving care, does not alone exclude them from the exemption." *Id.* at 562. In refuting a similar claim, another court has stated, "[p]laintiff has identified no authority, and the Court is unable to locate any, that supports this view of the companionship services exemption. In fact, the Court is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." *Terwilliger v. Home of Hope, Inc.*, 21 F.Supp.2d 1294, 1299, n. 2 (N.D.Ok.1998).

In regard to Plaintiff's argument that Congress did not intend to remove "enterprise coverage" to those employees who worked for covered agencies, the wording of the

Section 213(a)(15) and the statements of the Administrator of the Wage and Hour Division of the DOL (the "Administrator") support the conclusions of the *Johnston* and *Terwilliger* courts that Section 552.109(a) is valid. Section 213(a)(15), describes who is covered by the companionship exemption as "**any employee** employed on a casual basis in domestic service employment." (emphasis added.) The Administrator, in adopting 552.109(a) explicitly noted this language and stated "[t]his interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions". 40 Fed.Reg. 7404 (1975). It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing this specific issue, this Court may not say that the Administrator's interpretation is arbitrary or unreasonable.

This Court does find the reasoning of *Harris* and the DOL's statements in the proposed amendments somewhat compelling. However, other factors counsel against holding the regulations unenforceable. The strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years, strongly cautions against a finding that these regulations are unenforceable.

Section 213(a)(15) of the FLSA explicitly gives the DOL the right to define the terms "companionship services" and "domestic service." The 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history. In regards to

Section 552.109(a), the Court notes that the reasoning behind the companionship services exemption is arguably to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA.

The DOL's interpretation of Section 213(a)(15) in 1975 evidence that it believed the regulations were proper at the time the 1974 amendments were enacted. The DOL's withdrawal of the proposed amendments shows that it still believes that these long-standing regulations are appropriate in the current home healthcare environment. Despite amending Section 213(a)(15) seven times since 1074, Congress has chosen not to act. While this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit Congressional mandate. Accordingly, the Court finds that Sections 552.6 and 552.109(a) are not arbitrary, capricious or manifestly contrary to the FLSA.

D. The Sufficiency of the Complaint

1. The FLSA Claim

Having found the regulations proper, Plaintiff must properly allege a claim under them. The Court is aware that all of the cases cited above were in the context of motions for summary judgement, not motions on the pleadings pursuant to Rule 12(c). Nonetheless, the Complaint in its current form contains only conclusory alle-

gations that Plaintiff was a home healthcare attendant and that she is therefore entitled to minimum wage and overtime pursuant to FLSA. Plaintiff's counsel clarified at oral argument that his client could not properly allege a claim under the FLSA based on the regulations as they currently stand. Plaintiff's counsel's agreement at oral argument that this was a test case and that his client could not meet the standards of Section 552.6 confirm that Plaintiff can not properly allege a violation of the FLSA and the DOL's regulations promulgated thereunder. Accordingly, Defendants' motion on the FLSA claim is granted.

2. *State Law Claim*

Courts have consistently held that the dismissal of a plaintiff's federal claims merits dismissal of his pendent State law claims. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988); *Maric v. St. Agnes Hosp. Corp.,* 65 F.3d 310, 314 (2d Cir.1995) (citing *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)); *In re Merrill Lynch Ltd. P'ships Litig.,* 154 F.3d 56, 61 (2d Cir.1998). Having concluded that Defendants are entitled to judgment on the pleadings as to Plaintiff's underlying federal claims, this Court declines to exercise pendent jurisdiction over the corresponding State law claims. Plaintiff's State law claims are therefore dismissed without prejudice.

CONCLUSION

Defendants' Motion for judgement on the pleadings is GRANTED. Plaintiff's Motion for circulation of a Notice of Pendency and of a Consent to Joinder to similarly situated persons pursuant to 29 U.S.C. § 216(b) is DENIED. The Clerk of the Court is directed to close this case.

SO ORDERED.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7666

EVELYN COKE,
Plaintiff-Appellant,

—v.—

LONG ISLAND CARE AT HOME, LTD.,
and
MARYANN OSBORNE,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE SECRETARY OF
LABOR AS AMICUS CURIAE

INTEREST OF THE SECRETARY OF LABOR

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae*. The Secretary has a strong policy interest in defending the Department of Labor's regulations against judicial challenge. The plaintiff candidly referred to this action as a "test case," conceding that she cannot succeed under the regulations as they currently stand. Her claim for back wages under the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 201, *et seq.*, is based on her argument that the relevant regulations are inconsistent with congressional intent and, therefore, are invalid. Given this posture, the Secretary believes that this Court would derive great benefit from a presentation of her views on this case.

STATEMENT OF THE ISSUE

This case involves a challenge to the validity of the Department's regulations at 29 C.F.R. 552.6 and 552.109(a). Section 552.6 defines "companionship services," which are exempt from FLSA minimum wage and overtime coverage under 29 U.S.C. 213(a)(15), to include related and general, incidental housework. Section 552.109(a) extends this exemption to employees who are employed by an employer or agency other than the family or household using the employees' companionship services. The issue on appeal is whether these legislative rules interpreting the statutory exemption are reasonable and therefore should be upheld.

STATEMENT OF THE CASE

A. *Statement Of Facts*

By decision dated May 23, 2003, the district court granted the defendants' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), and denied the plaintiff's motion to certify a collective action under 29 U.S.C. 216(b). *Coke* v. *Long Island Care At Home, LTD.*, 267 F. Supp.2d 332 (E.D.N.Y. 2003). The court's decision sets forth only a few rudimentary facts. Maryann Osborne is the owner and sole shareholder of Long Island Care at Home, Ltd. ("Long Island Care"), an agency that provides home healthcare to private individuals. Evelyn Coke ("Coke") has been employed by Long Island Care as a "home healthcare attendant" since 1997. Coke contends that, despite working more than 40 hours a week, she received no overtime payments and was paid less than the FLSA minimum wage. Coke acknowledges, however, that she cannot establish a claim under the FLSA if the Department's regulations that exempt workers who provide "companionship services" are controlling. 267 F. Supp.2d at 332. Thus, she brings this action as a "test case" in order to challenge the validity of these regulations. *Id.* at 341.

B. *Statutory And Regulatory Framework*

At the time that Congress amended the FLSA in 1974 expressly to extend coverage to employees in "domestic service," it excluded from coverage "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (*as such terms are defined and delimited by regulations of*

the Secretary)." 29 U.S.C. 213(a)(15) (emphasis added). *See generally* 29 C.F.R. 552.2.

Under this explicit grant of authority, the Secretary of Labor defined "companionship services," in pertinent part, as follows:

> [T]he term *companionship services* shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, That such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked.

29 C.F.R. 552.6. The Department's Wage and Hour Division has further clarified in an opinion letter that "such activities as cleaning the patient's bedroom, bathroom or kitchen, picking up groceries, medicine, and dry cleaning would be *related to personal care of the patient* and would be the type of household work that would be *exempt* work for purpose of section 13(a)(15) of the FLSA. However, activities involving heavy cleaning such as cleaning refrigerators, ovens, trash or garbage removal and cleaning the rest of a 'trashy' house would be *general household work* or *nonexempt* work that is subject to the 20 percent time limitation." 1995 WL 1032475 (March 16, 1995) (emphases added).

The Secretary's regulations also state that the term "domestic service employment" as used in section 13(a)(15) "refers to services of a household nature performed by an employee in or about a private home (per-

manent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3. However, the Secretary extended the section 13(a)(15) exemption for employees engaged in "companionship services" to those "who are employed by an employer or agency other than the family or household using their services." 29 C.F.R. 552.109(a).

Both these regulations, 29 C.F.R. 552.6 and 552.109(a), were promulgated pursuant to notice and comment rulemaking in 1975, soon after the enactment of the 1974 amendments to the FLSA, and thus have been in effect for approximately 28 years.

C. *The District Court's Decision*

The district court observed that this Court has never expressly ruled on the validity of either of these two regulations, but that nearly all other courts faced with the issue have upheld both. 267 F. Supp.2d at 336 (citing *Johnston* v. *Volunteers of America, Inc.*, 213 F.3d 559, 562 (10th Cir. 2000) (upholding section 552.109(a)); *Salyer* v. *Ohio Bureau of Workers' Compensation*, 83 F.3d 784, 787 (6th Cir.) (upholding section 552.6), *cert. denied*, 519 U.S. 964 (1996); *McCune* v. *Oregon Senior Services Division*, 894 F.2d 1107, 1110-11 (9th Cir. 1990) (same)). The court noted that one district court had recently reached a contrary result. *Id.* (citing *Harris* v. *Dorothy L. Sims Registry*, 2001 WL 78448, at *5 (N.D. Ill. 2001) (invalidating the definition of "companionship services" in section 552.6 "to the extent it exempts homemakers from [FLSA] coverage").

The district court recognized that the Department's longstanding interpretation of the FLSA, promulgated pursuant to specific congressional authorization, is "entitled to great weight" if reasonable. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467

U.S. 837, 844 (1984). The court proceeded to discuss in detail the Department's proposal to amend both regulations, which was published for comment in January 2001, because the court also recognized that an agency's " 'revised interpretation deserves deference.' " 267 F. Supp.2d at 337 (quoting *Rust* v. *Sullivan*, 500 U.S. 175, 186 (1991)).

The Department, pointing to the fact that some home health care workers were performing duties and working in situations not envisioned when the regulations were promulgated, proposed three alternatives to the definition of "companionship services" in section 552.6, each of which would increase the emphasis on *fellowship* (as opposed to the kind of work performed by a maid or household worker) as a "critical component of a companion's duties." 66 Fed. Reg. 5481, 5488 (January 19, 2001). Each alternative would have eliminated the current 20 percent tolerance for general household work. The Department also proposed to amend section 552.109(a) in order to make the section 13(a)(15) exemption applicable "only with respect to the family or household using the worker's services." 66 Fed. Reg. at 5485. The court observed, however, that the Department withdrew these proposed amendments in April 2002. 67 Fed. Reg. 16668 (April 8, 2002).

The court discounted the *Harris* decision because it "relied heavily on the proposed amendments" in reaching its conclusion that the definition of "companionship services" is invalid. 267 F. Supp.2d at 338. As noted by the district court, the court in *Harris* reached this conclusion after the proposed amendments were issued, but before they were withdrawn. Although the court found the reasoning of *Harris* and the Department's statements in the proposed amendments to be "somewhat compelling," it nonetheless concluded that other factors

counseled against holding the unrevised regulations unenforceable. 267 F. Supp.2d at 340. These included "strong deference courts must afford to federal agencies regulations, the explicit grant of authority to the DOL to define and delimit Section 213(a)(15), the withdrawal of the proposed amendments, and the fact that these regulations have been in effect for over twenty-eight years." *Id.*

The court found the definition of "companionship services" contained in section 552.6 to be reasonable and in accordance with the statute because "[t]he 20% requirement seemingly attempts to keep the exemption limited to those who predominately provide companionship, which is consistent with the legislative history." 267 F. Supp.2d at 340. The court upheld section 552.109(a) because it promotes "the reasoning behind the companionship services exemption"—"to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA." *Id.*

The court specifically rejected the plaintiff's argument that Congress, when it extended coverage to domestic service employees in 1974, did not intend to remove coverage of home healthcare employees employed by third parties, who, prior to 1974, would have been covered under the Act's "enterprise coverage" provisions when they worked for large agencies. In this regard, the court was persuaded by the language of section 13(a)(15) which exempts *"any employee* employed in domestic service employment to provide companionship services" (emphasis added), a point explicitly noted by the Admin-

istrator in promulgating the regulation at section 552.109(a).[1] 267 F. Supp.2d at 340. The court stated, "It may be that Congress did not intend to exempt employees hired by a third-party. However, based on the wording of the statute and the lack of any clear legislative history discussing the specific issue, this Court may not say that the Administrator's interpretation is arbitrary or unreasonable." *Id.*

In sum, the district court, referring to the fact that Congress has done nothing to change the Department's regulations despite amending the FLSA several times since 1974, concluded that "[w]hile this Court is sympathetic to home care workers who perform such laborious work under difficult circumstances, the judiciary is not in a position to strike a regulation which is reasonable in light of the DOL's explicit mandate." 267 F. Supp.2d at 341.

SUMMARY OF ARGUMENT

Because sections 552.6 and 552.109(a) were both promulgated in 1975 in response to an express delegation of authority by Congress and are the products of notice and comment rulemaking, they are entitled to *Chevron* deference. Under *Chevron,* the Secretary's regulations must

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[1] Actually, the district court mistakenly quoted the language of section 13(a)(15) that applies only to babysitting services, i.e., "any employee employed on a casual basis in domestic service employment." The Department's regulations make clear that the Act's "casual" limitation does not apply to companionship services. *See* 29 C.F.R. 552.106. It is clear, however, that the district court was relying on the statutory language referring to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15).

be upheld if they represent reasonable, permissible interpretations of the statute.

The section 552.6 definition of "companionship services" is reasonable because it is consistent with legislative history indicating that Congress did not intend that even the performance of some general, incidental household work would disqualify an employee from being exempt under section 13(a)(15). The inclusion within the "companionship services" exemption, under section 552.109(a), of companionship workers who are employed by third party employers also reflects a reasonable interpretation of the statute. As noted by the courts, section 552.109(a) is consistent with the policy underlying the exemption of making companionship services more financially affordable to the elderly and disabled, who might otherwise be institutionalized.

These regulations are also "entitled to great weight" because they were promulgated soon after the 1974 statutory amendments to the FLSA were enacted and thus have been in effect continuously for over 28 years. Additionally, although the FLSA has been amended numberous times since these regulations became effective, Congress has not taken any of these opportunities to address or amend the Secretary's regulatory interpretations of the "companionship services" exemption. Congress's inaction in this regard is persuasive evidence that the Secretary's interpretations are reasonable and correct.

With one exception, all courts that have addressed the validity of either of these regulations have upheld them. The one exception, *Harris*, is easily discounted since the court improperly relied upon proposed amendments to the regulations that were subsequently withdrawn and, consequently, had no controlling effect.

Finally, the Administrator recently issued an opinion letter reaffirming the Department's position under section 552.109(a) that employees of a third party employer working as domestic service employees in private homes may qualify for the section 13(a)(15) exemption. This opinion letter, since it is consistent with the case law and the policy underlying the "companionship service" exemption, is also entitled to some deference.

ARGUMENT

THE DEPARTMENT'S LONGSTANDING REGULATIONS AT 29 C.F.R. 552.6 AND 552.109(a), WHICH WERE PROMULGATED PURSUANT TO SPECIFIC CONGRESSIONAL AUTHORIZATION AND AFTER NOTICE AND COMMENT RULEMAKING, SHOULD BE UPHELD BECAUSE THEY REPRESENT A REASONABLE CONSTRUCTION OF THE FLSA'S SECTION 13(a)(15) "COMPANIONSHIP SERVICES" EXEMPTION.

A. *Both Section 552.6 And 552.109(a) Are Entitled To* Chevron *Deference.*

"When Congress has 'explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (quoting *Chevron*, 467 U.S. at 843-44). To accord an agency interpretation *Chevron* deference means that "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because

the agency's chosen resolutions seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* at 229 (citations omitted).

Following *Mead Corp.*, this Court has stated that an agency interpretation " 'qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority.' " *Chao* v. *Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2nd Cir. 2002) (quoting *Mead Corp.* 533 U.S. at 226-27) (emphasis supplied by this Court). This Court determines the appropriate level of deference owed under *Mead Corp.* to the statutory interpretations of the Secretary by considering "whether 'the agency interpretation claiming deference was promulgated in the exercise of [the Secretary's rule-making] authority.' " *Id.* at 227 (quoting *Mead Corp.*, 533 U.S. at 227). If the agency interpretation represents " 'the fruits of notice-and-comment rulemaking or formal adjudication,' " this Court will generally give it full *Chevron* deference. *Id.* (quoting *Mead Corp.*, 533 U.S. at 230). *See also Madison* v. *Resources for Human Development, Inc.*, 233 F.3d 175, 181 n.8 (3rd Cir. 2000) ("afford[ing] deference" to the Secretary's "companionship services" regulations at 29 C.F.R. 552.3 and 552.101 because they are the product of "notice and comment rule making").

In this case, Congress explicitly delegated authority to the Secretary to define and delimit the terms of the "companionship services" exemption contained in section 13(a)(15) of the Act. Coke concedes on appeal that section 552.6 was indeed promulgated in response to this express congressional delegation of authority and is

therefore entitled to *Chevron* deference. Coke argues, however, that the district court erred in giving section 552.109(a) *Chevron* deference because it is an "interpretive" regulation. Coke notes that section 552.109(a) is contained in "Subpart B-Interpretations," whereas section 552.6 is located in "Subpart A-General Regulations." This formulaic distinction does not provide a meaningful basis for according section 552.109(a) a lower degree of deference. Like section 552.6, section 552.109(a) serves to "define and delimit" the terms of the "companionship services" exemption under Congress' express delegation of authority. Similarly, section 552.109(a) is the product of the notice and comment rulemaking that took place shortly after the section 13(a)(15) "companionship services" exemption was enacted in 1974. *See* 40 Fed. Reg. 7405 (Feb. 20, 1975). Therefore, like section 552.6, section 552.109(a) is entitled to *Chevron* deference.[2] *See Madison*, 233 F.3d at 181 n.8 (giving *Chevron* deference to the Secretary's "interpretive" regulation at 29 C.F.R. 552.101).[3]

B. *Section 552.6 Is A Reasonable Interpretation Of The Statute.*

The district court correctly concluded that the definition of "companionship services" contained in section 552.6 is reasonable and in accordance with the statute

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[2] Moreover, to the extent that the regulation at 29 C.F.R. 552.109(a) may be characterized as the Secretary's interpretation of her own regulation at 29 C.F.R. 552.6, it is entitled to a high degree of deference. *See Christensen* v. *Harris County*, 529 U.S. 576, 578 (2000); *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

[3] Since no facts are in dispute and the district court's decision turns upon a question of statutory construction, this Court's review should be de novo. *See United States* v. *Si Lu Tian*, 339 F.3d 143, 156 (2nd Cir. 2003).

because the 20 percent limitation on the amount of general household work that can be performed "keep[s] the exemption limited to those who predominately provide companionship, which is consistent with the legislative history." 267 F. Supp.2d at 340. The legislative history to which the district court refers is that quoted by the Ninth Circuit in *McCune:*

> The fact that persons performing casual services as babysitters or services as companions do some incident of household work does not keep them from being casual babysitters or companions for purposes of this exclusion.

894 F.2d at 1111 (quoting H.R. Rep. No. 913, 1974 U.S.C.C.A.N. at 2845). Thus, Congress intended that even the performance of some general, incidental household work, as well as household work related to the care of the aged or infirm, would not disqualify an employee from coming under the section 13(a)(15) exemption. Indeed, because the statute refers to "companionship services" for individuals who "are unable to *care* for themselves," 29 U.S.C. 213(a)(15) (emphasis added), it is manifestly reasonable for the regulatory definition of "companionship services" to include a significant "care" component that allows for the performance of some household work.

Although this Court has not addressed the validity of section 552.6, both the Sixth and Ninth Circuits have upheld the validity of the regulation's definition of "companionship services." In *Salyer,* the Sixth Circuit affirmed the regulation's inclusion within "companionship services" of " 'household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services.' " 83 F.3d at 787 (quoting 29 C.F.R. 552.6). As the Sixth

Circuit stated, "[W]e cannot say that this regulatory definition of 'companionship services' is either 'arbitrary, capricious, or manifestly contrary to the statute' that it elucidates." *Id.* (quoting *Chevron*, 467 U.S. at 844). In *McCune*, the Ninth Circuit held that the 20 percent limit on general household work was reasonable, and upheld the district court's conclusion that any household work "related" to the care of the individual would *not* be counted towards the 20 percent threshold.

The only contrary authority is easily discounted. In *Harris*, the plaintiffs were "homemakers" who were employed by an agency that instructed them "to go to clients' homes and work a set number of hours for the clients." The plaintiffs were required to perform a certain amount of housework, as well as "prepare meals, wash laundry, and run errands for clients." In determining that section 552.6 was invalid to the extent it covers "homemakers," such as the plaintiffs in that case, the court relied heavily upon the Department's 2001 proposed amendments. *See* 2001 WL 78448, at *4, 5 ("The evidence most damaging to Sims' contention that Congress intended to exempt homemakers from coverage is the DOL's recent proposal to amend the regulations pertaining to the companionship exemption. . . . It is obvious from the proposed amendments that the DOL agrees the current definition of 'companionship services' under § 552.6 is unreasonable. This alone is sufficient reason to disregard the current version of § 552.6."). But, subsequent to the decision in *Harris*, the Secretary withdrew this regulatory proposal. By doing so, the Department, in effect, reaffirmed the "companionship services" regulations as they currently stand. Thus, given that the court relied upon a proposed regulatory interpretation that was subsequently withdrawn by the Department, and given the reasonableness of the regu-

lation as it stands, the *Harris* decision is unpersuasive authority.[4]

Coke's primary argument against the validity of section 552.6 is that its definition of "companionship services" is contrary to the plain language of the statute. In essence, Coke argues that the Secretary's interpretation of "companionship services" is subject to a *Chevron* "step one" analysis, i.e., if Congress "has directly spoken to the precise question at issue" in the text of the statute, the plain meaning of the text governs. *See Chevron*, 467 U.S. at 842-43. Here, however, Congress expressly directed the Secretary to interpret and define the terms of the statutory language at issue. Therefore, the proper question is not "whether the statute unambiguously forbids the agency's interpretation," but "whether the interpretation, for other reasons, exceeds the bounds of the permissible." *See Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002).

Coke also appears to argue that section 552.6 is unreasonable because its definition of "companionship services" would include "employees whose sole function is to perform 'household work' as companions even if they provide *no* supervision or fellowship." Appellant's Brief, p. 22. This argument is based on a misreading of the regulation. Under section 552.6, an employee must "provide fellowship, care, and protection" for a person unable to care for himself in order to meet the requirements of the

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[4] The court in *Harris* clearly erred, of course, in relying on *proposed* regulations in the first place. *See Greenhalgh* v. *Putnam Savings Bank*, 140 F.3d 427, 429 n.4 (2nd Cir. 1998) ("[P]roposed regulations are not authoritative until finalized."); *Oakley* v. *City of Longmont*, 890 F.2d 1128, 1133 (10th Cir. 1989) (stating that a proposed regulation has no force or effect until "the agency completes formal rulemaking and promulgates final regulations"), *cert. denied*, 494 U.S. 1082 (1990).

"companionship services" exemption. While the regulation allows for the performance of some household work, it must be either "related to" or "incidental" to the "care of the aged or infirm person." *See* 29 C.F.R. 552.6. Thus, contrary to Cokes' suggestion, an employee hired only to perform household work or as a "full-time cook" would not meet the requirements of the regulation. *See* Appellant's Brief, p. 16. An employee who has not been hired primarily to provide "fellowship, care, and protection" will not be considered exempt under the Act or the regulations. *See* 29 C.F.R. 552.6.

C. *Section 552.109(a) Is A Reasonable Interpretation Of The Statute.*

The district court properly upheld section 552.109(a) because it promotes "the reasoning behind the companionship services exemption"—"to allow those in need of such services to be able to find such assistance at a price they can afford. Whether that service is provided by the direct hiring of an employee or through the use of an agency, the objective is still the same; to allow for the procurement of companionship services without being required to meet the minimum wage and overtime provisions of the FLSA." 267 F. Supp.2d at 340.

This rationale for upholding section 552.109(a) is consistent with that provided by the Ninth Circuit in *McCune*. As the Ninth Circuit stated,

> [T]hese critical services reach more elderly or infirm individuals than they otherwise would precisely because the care-providers are exempt from the FLSA. We also note that many private individuals, who do not benefit from federal and state assistance, may also be forced to forego the option of receiving these services in their homes if the cost

> of the services increases. The only alternative for these individuals may be institutionalization.

894 F.2d at 1110. *See also Lott* v. *Rigby,* 746 F. Supp. 1084, 1087 (N.D. Ga. 1990) (noting, after reviewing a Department of Labor administrative opinion, that "Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them"). *See also Salyer,* 83 F.2d at 788. In this case, the district court correctly noted that this underlying congressional policy is served regardless of "[w]hether that service" is provided by the direct hiring of an employee or through the use of an agency." 267 F. Supp.2d at 340.

Coke argues that section 552.109(a) is entitled to no deference because it is inconsistent with other regulatory interpretations of the "companionship services" exemption. Specifically, Coke argues that the inclusion of employees of third parties within the exemption under section 552.109(a) is inconsistent with the Department's definition of "domestic service employment," i.e., "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person *by whom he or she is employed."* 29 C.F.R. 552.3 (emphasis added). While this argument may have some superficial appeal, federal courts have nonetheless continued to give deference to the Secretary's interpretation in section 552.109(a). Thus, in denying a challenge to the validity of section 552.109(a), the Tenth Circuit expressly held that "the fact that domestic service employees are not employed by the individual receiving care does not alone exclude them from the exemption." *Johnston,* 213 F.3d at 562. In reaching this conclusion, the court noted that all other courts that have been confronted with the question have rejected challenges to the

validity of section 552.109(a). *See, e.g., Madison* v. *Resources for Human Development, Inc.*, 39 F. Supp.2d 542, 545 n.3 (E.D. Pa. 1999) (holding that, under section 552.109(a), "[a]lthough the plaintiffs are employed by RHD rather than the individuals they serve, that by itself does not exclude them from the exemption."), *vacated and remanded on other grounds,* 233 F.3d 175 (3rd Cir. 2000); *Terwilliger* v. *Home of Hope, Inc.*, 21 F. Supp.2d 1294, 1299 n.2 (N.D. Okla. 1998) (rejecting, as inconsistent with section 552.109(a), the plaintiffs' argument that they were not engaged in "domestic service employment," as defined in 29 C.F.R. 552.3, because they were employed by an agency and not the individual clients).[5]

The Administrator of the Wage and Hour Division also has, in effect, rejected this argument in a recent opinion letter dated August 16, 2002 (copy attached). The Administrator noted there that two previous opinion letters, in an attempt to reconcile section 552.109(a) with section 552.3, "appear to indicate that employees of a third party employer working as domestic service employees in private homes may not qualify for the Section 13(a)(15) exemption unless they are *jointly employed* by the third party employer and the household where they are employed." Based on federal case law upholding the validity of 29 C.F.R. 552.109(a) as written, the Administrator clarified that "under 29 C.F.R. 552.109(a), an employee who is engaged in providing companionship services in private homes and *who is employed by a third party employer other than the family or household receiving the worker's services* is exempt from the minimum wage and overtime require-

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[5] In *Terwilliger,* the court even stated that it "is not aware of any cases where the subject employees were employed by the individual client, rather than by an agency." 21 F. Supp.2d at 1299 n.2.

ments under Section 13(a)(15) of the Fair Labor Standards Act." (Emphasis added.) The Administrator rescinded and withdrew all prior opinions expressing a contrary view.

This opinion letter is consistent with the case law and the policy reasons underlying the "companionship services" exemption, and is therefore entitled to deference. *See Reid* v. *Miss Paula's Day Care Center, Inc.*, 37 F.3d 1191, 1194 (6th Cir. 1994) ("Because DOL's Wage and Hour Administrator is the primary federal authority entrusted with determining the FLSA's scope, these interpretations [set forth in a Wage-Hour opinion letter and Wage-Hour's Field Operations Handbook], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which the courts and litigants may properly resort for guidance.") (internal quotation marks omitted). *See also Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944); *Freeman* v. *National Broadcasting Company, Inc.*, 80 F.3d 78, 84 (2nd Cir. 1996).

Coke also argues that section 552.109(a) is invalid because it excludes from coverage home healthcare workers who had been subject to "enterprise coverage" prior to the 1974 Amendments.[6] A review of the history

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[6] Before the district court, Coke relied upon *Homemakers Home and Health Care* v. *Carden*, 538 F.2d 98 (6th Cir. 1976), to support this argument. In that case, the court upheld a stipulated finding of fact that the defendant, a home health care services company, was subject to FLSA enterprise coverage. *Homemakers Home*, however, involved employment prior to the 1974 Amendments, and thus did not address the section 13(a)(15) exemption. It provides no guidance as to whether Congress intended to exempt employees of third parties when it exempted "companionship services" from FLSA coverage under the 1974 Amendments.

of the "companionship services" regulations demonstrates that the Secretary has already considered and resolved this question under her rulemaking authority. Section 552.109, as originally proposed, stated that employees providing companionship services, who are employed by third party employers meeting the Act's "enterprise coverage" requirements, are not exempt under section 13(a)(15) because "their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic service employees." *See* 39 Fed. Reg. 35382, 35385 (September 25, 1974). The Department ultimately determined, however, that the specific language of the statute that exempts, without qualification, "any employee employed in domestic service employment to provide companionship services" outweighed any concern for the continuation of coverage of some employees under an "enterprise coverage" theory. *See* 40 Fed. Reg. 7404, 7505-06 (February 20, 1975) ("This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions."); *cf. Mitchell* v. *Gammill,* 245 F.2d 207, 208-09, 211 (5th Cir. 1957) (holding that the section 13(a)(2) "retail and service establishment" exemption (since repealed) applied without qualification to "any employee" of such an establishment, including those who did no retail or service work); *McComb* v. *Union Stock Yards,* 168 F.2d 375, 377 (7th Cir. 1948) (applying the section 13(b)(2) "rail carrier" exemption to "any employee" of a rail carrier regardless of the type of work performed by that employee). Thus, the Secretary provided a reasonable explanation for including those employees hired by third-party agencies within the section 13(a)(15) exemption.

Coke also argues that promulgation of section 552.109(a) violated the notice and comment requirements of the Administrative Procedure Act ("APA") because "the final regulation was the exact opposite of the proposed regulation." Appellant's Brief, p. 34. The district court declined to consider this argument because it was not properly raised. *See* 267 F. Supp.2d at 336 n.3. Because this issue was not raised in the district court, it is waived. *See, e.g., Local 538 United Brotherhood of Carpenters and Joiners of America* v. *United States Fidelity and Guaranty Co.*, 70 F.3d 741, 743 (2d Cir. 1995). *See also Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below.") *(quoted in Christensen* v. *Kiewit-Murdock Investment Corp.*, 815 F.2d 206, 215 (2nd Cir. 1987)). However, even if this Court were to consider this argument, it has no merit.[7]

In support of her APA argument, Coke cites *National Black Media Coalition* v. *FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986), and *AFL-CIO* v. *Donovan*, 757 F.2d 330, 338 (D.C. Cir. 1985), which stand for the proposition that "if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." These cases also state that "the final rule must be a 'logical outgrowth' of the rule proposed," and "[t]he test that has been set forth is whether the agency's notice would 'fairly apprise interested persons of the subjects and issues' [of the rulemaking]." *National Black Media*, 791 F.2d at 1022 (quoting *AFL-CIO*, 757 F.2d at 338). The

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[7] It also stands to reason that the appropriate time for a challenge to the adequacy of the notice and opportunity to comment on the substance of section 552.109(a) would have been soon after the regulation was promulgated, not 28 years later.

Department's promulgation of section 552.109(a) meets these standards.

In *National Black Media,* the court concluded that agency notice was inadequate because the agency's final rule, abandoning a policy set forth in the proposed rule, was based on "critical, yet unpublished, data" that had not been disclosed to the public for review and comment. 791 F.2d at 1023-24. In *AFL-CIO,* the court concluded that notice and comment requirements were violated because the agency had provided no notice that any change was proposed, or even contemplated, with respect to the existing regulation that was substantially modified by the final rule.

This case is unlike either *National Black Media* or *AFL-CIO.* Because the Department was proposing to add 29 C.F.R. Part 552, "defining and delimiting" the terms of the "companionship services" exemption, the public was on adequate notice that newly proposed section 552.109 was subject to change. Moreover, the proposed regulation expressly contained an explanation for why employees of third parties were not considered exempt, i.e., in order not "to deny the Act's protection to previously covered domestic service employees." This explanation was subject to public comment. The Department's ultimate conclusion, that including employees of third-party employers within the exemption is "more consistent" with the statutory language and past practices, is a "logical outgrowth" of the proposed rule. In fact, the process here illustrates the way that notice and comment should work, i.e., the agency made a considered judgment *after* reviewing the comments on a clearly particular proposed rule. *See City of Waukesha* v. *Environmental Protection Agency,* 320 F.3d 228, 245 (D.C. Cir. 2003) ("As we noted in *International Harvester Co.* v. *Ruckelshaus,* 478 F.2d 615, 632 n.51 (D.C.

Cir. 1973), '[a] contrary rule [than that giving the agency the authority to promulgate a final rule different in some particulars from the proposed rule] would lead to the absurdity that . . . the agency can learn from the comments on its proposal only at the peril of starting a new procedural round of commentary.' ") (ellipsis in original).

D. *The Longstanding Nature Of The Department's Regulations Weighs In Favor Of Upholding Them.*

The regulations in question were promulgated in the year following the 1974 statutory amendments, and have now been in effect for over 28 years. The Supreme Court has stated that "a long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight." *Leary* v. *United States,* 395 U.S. 6, 25 (1969) (internal quotation marks omitted). The Supreme Court has also held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.' " *CFTC* v. *Schor,* 478 U.S. 833, 846 (1986) (quoting *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 274-75 (1974)). Despite numerous opportunities to do so, Congress has not acted to "correct" the Department's regulatory interpretations of the "companionship services" exemption, which have been in effect since 1975. Furthermore, the Department's withdrawal of the amendments proposed in January 2001 demonstrates that the Department "still believes that these long-standing regulations are appropriate in the current home healthcare environment." 267 F. Supp.2d at 341.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's determination that sections 552.6 and 552.109(a) represent reasonable, permissible interpretations of the statute and, therefore, are not arbitrary, capricious, or manifestly contrary to the FLSA.

Respectfully submitted,

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Appendix D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

Coke v. Long Island Care at Home, *et al.*

DECLARATION OF MARYANN OSBORNE

MARYANN OSBORNE, pursuant to 28 U.S.C. § 1746, and subject to the penalties of perjury, declares as follows:

1. I am a defendant-appellee in the above-captioned appeal and vice president of Long Island Care at Home, Ltd. ("LICAH"), also a defendant-appellee herein (collectively, "Defendants"). I make this declaration in support of Defendants' motion to stay this Court's mandate for ninety (90) days pending Defendants' application for certiorari review in the Supreme Court of the United States. The information contained in this declaration is based upon the personal knowledge I have acquired as an officer of LICAH.

2. LICAH employs approximately forty (40) home health care aides, who provide companionship services to approximately thirty (30) homebound patients.

3. Pursuant to the exemption from federal overtime wage and hour requirements permitted by 29

C.F.R. § 552.119(a), LICAH currently pays its home health care aides $8.00 per hour for an average 70-hour work week. Thus, on average, LICAH home health care aides earn approximately $560.00 per week.

4. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for LICAH employees and clients.

5. Given current limitations on government reimbursement for Medicaid patients receiving home health care companionship services, LICAH's existing business plan will result in tremendous and unsustainable losses to the company if LICAH is obligated to comply with federal overtime wage and hour requirements.

6. Thus, in order to comply with federal law while also avoiding such losses, LICAH will be forced to limit each employee's total work schedule to forty (40) hours per week, thereby avoiding higher overtime pay rates, and/or to reduce each employee's hourly wage. As a consequence, most employees will likely suffer an average 43% weekly salary reduction—or, stated differently, most LICAH home health care aides will be limited to earning $320.00 per week rather than their current $560.00 per week.

7. LICAH's homebound elderly and infirm clients will also suffer the brunt of this Court's ruling. Because it will be economically prohibitive for LICAH to assign any one home health care aide to work with a patient for more than forty (40) hours per week, the majority of patients will have

to accept multiple aides entering their homes. Indeed, depending on a given patient's needs and certain reimbursement conditions, the circumstances may require assigning as many as three or more home health care aides each week to assist a client.

8. In my experience, assigning multiple home health care aides to individual patients creates a serious hardship for the patients and their families. The presence of multiple care providers in a home is often very stressful for elderly and infirm individuals. The relationship between home health care aides and their patients is often intimate and grounded in a trust that builds over time. Because of their physical and mental conditions, many elderly and infirm patients suffer from heightened fearfulness, and they find it extremely difficult to acclimate to different care providers. This troubling dynamic often assaults the dignity of patients, undermines the quality of care that they receive, and is therefore detrimental to their well being.

9. Coordinating the presence of multiple care providers in a single home also often imposes a difficult burden on the patient's family members. Numerous shift changes during the day raises the likelihood that gaps in care may occur between shifts—requiring family members to fill in for a missing home health care aide or to leave the patient unattended. When family members are unwilling or physically unable to step in, or are prevented from supplying the necessary care because of other family-related demands or work, serious problem can arise. Moreover, in my expe-

rience, home health care aides who are assigned shorter shifts, and therefore stand to earn less for each client visit than those aides who are assigned longer hours with an individual, have a lesser economic incentive to be reliable and dedicated to their patients.

10. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

January 14, 2005

/s/MARYANN OSBORNE
MARYANN OSBORNE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

ROXANNE TENA-NELSON declares the following:

1. I am vice president of the Continuing Care Leadership Coalition, Inc. ("CCLC"), a non-party that has a strong interest in this case, because compliance with the Court's decision, upon issuance of the mandate, will have serious negative implications for not-for-profit continuing care providers in New York. I am the attorney who previously submitted a motion for leave to file an amicus curiae brief, on behalf of CCLC, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. CCLC represents the interests of over 100 not-for-profit and public organizations providing long term

care services in metropolitan New York and beyond. Our membership includes forty-three (43) mission-driven home care providers who offer essential health care and other services to tens of thousands of individuals in their homes. The remainder of our membership relies heavily on the existing home care system in order to provide a full range of long term care services to older and disabled individuals.

3. As charitable, not-for-profit providers obligated to serve their local areas, CCLC's members have a unique commitment to their religious or community-focused missions, strict accountability to their boards and to their communities, and an extensive record of innovation in caring for patients. Our mission-driven members are not focused on creating a bottom-line profit, but rather they reinvest in new services and assist their communities with service enhancements.

4. This declaration is submitted in support of Defendants-Appellees' motion to stay this Court's mandate for ninety (90) days pending Defendants-Appellees' application for certiorari review in the Supreme Court of the United States. Compliance with this Court's decision, upon issuance of the mandate, will have serious negative impact on the access and quality of care for the tens of thousands of older and disabled individuals receiving services through our member organizations based upon significant increased costs for home care services, costs that cannot be absorbed by a financially fragile health care sector that disproportionately relies on government reimbursement.

5. Implementation of this Court's ruling invalidating 29 C.F.R. § 552.109(a) will have drastic and harmful consequences for CCLC members and patients by increasing expenses for other components of New York

State's long term care system, which heavily relies on home care services. The resulting disruption in the continuum of care will negatively affect patients receiving and seeking health services.

IMPLICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

6. The Court's decision will destabilize New York State's overall long term care system, will diminish labor-management achievements in the metropolitan New York area, will hinder the broader health care system, and will undermine the State's commitment to supporting care of older and disabled individuals at home and in the community.

A. Impact on the Overall Long Term Care System

7. New York's long term care system provides a broad range of options for older and disabled individuals either to receive services at nursing facilities or to live in the community with supportive services. Unfortunately, long term care providers in New York and throughout the nation rely heavily on governmental payments that do not reflect current health care costs. Because CCLC's members are not-for-profit providers, they are particularly committed to serving the low-income population, a large portion who receive services through Medicaid. Based on CCLC's analysis of 2002 audited financial statements, CCLC has determined that over half of the long term care providers in New York are losing money. Of these financially distressed organizations, a substantial percentage operate home health agencies and thus would be subject to additional financial hardship should the Court's decision stand. These

financial strains would compound existing cost pressures associated with expected cuts to the Medicaid system, an increasingly burdensome set of regulatory requirements, a variety of workforce challenges, and resource intensive quality improvement initiatives.

8. In addition, the Court's decision will disrupt other components of the long term care system that rely on home health care services, such as adult day health care, long term home health care or "nursing home without walls" program, senior housing, and managed long term care—a capitated plan that allows nursing home certifiable individuals remain at home with supportive services.

B. Impact on the Labor-Management Achievements

9. This Court's decision will hinder the monumental strides made during the recent labor-management bargaining process in the metropolitan New York area. Long term care providers share an interest in paying home care workers a reasonable wage and benefit package in order to retain talented staff. Home care agencies and home care workers have made progress toward achieving important wage and benefit increases, reflected in recent labor negotiations. However, the Court's decision will significantly disrupt the progress of recognizing the common need for a reasonable wage and benefit package and undermine achievements made between labor and management.

C. Impact on the Broader Health Care System

10. The Court's decision will also obstruct the flow of health care delivery between hospitals and home health care agencies, particularly for individuals in New

York City that are discharged from the hospital to a home health agency through The Bridge Program, expedited hospital discharge program that allows hospital patients to be discharged to home health agencies rather than lingering in the hospital setting. By creating disruptions in the continuity of care provided by home health agencies, the Court's decision impairs the ability of hospitals to discharge patients to more appropriate home and community settings in a timely manner, and thus increases the average length of stay and creates a new financial burden on already financially fragile acute care institutions. Based on CCLC's analysis of 2002 audited financial statements, CCLC estimates that a one day increase in the length of stay for patients in New York hospitals that are discharged to home health agencies would cost the health care system $96 million. Because of the shared responsibilities involved in Medicaid reimbursement, an additional day will increase costs to hospitals, the State, local governments, the federal government, and the workers' compensation system, and will result in less access to hospital beds for patients who need them.

D. Impact on New York's Commitment to Home Care as a Vital Service

11. The Court's decision will undermine New York's commitment to home care as an essential element of the State's long term care system. Since the 1970s, when New York State made a policy decision to make home care services a core element of our long term care system, New York has continued its commitment to offering services in the least restrictive setting by supporting its home and community-based services programs. New York's commitment to home care is consistent with the U.S. Supreme Court's *Olmstead* decision, which found

that state and public agencies must make reasonable accommodations to enable disabled individuals to receive services in the least restrictive setting under Title II of the Americans with Disabilities Act (ADA). The generous mix of home and community-based programs available to older and disabled people has helped over 121,000 older New Yorkers, 76% of whom are in the New York City region, continue to live in the community with the needed supports.

CONCLUSION

12. In sum, absent the requested stay, this Court's invalidation of 29 C.F.R. § 552.109(a) will cause serious and irreversible hardships for caregivers and patients alike pending completion of the certiorari process. Because such widespread pain cannot be justified under any logical rationale, Defendants' respectfully request that the Court stay the issuance of its mandate for ninety (90) days.

WHEREFORE, it is respectfully submitted that Defendants-Appellees' motion for an order to staying the mandate the filing of a petition of a writ of certiorari in the U.S. Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 14, 2005.

January 14, 2005

/s/ROXANNE TENA-NELSON
ROXANNE TENA-NELSON
Tel (212) 258-5330 or
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.
and MARYANN OSBORNE,

Defendants-Appellees.

DECLARATION IN SUPPORT OF MOTION

SUSAN CHOI-HAUSMAN declares the following:

1. I am of counsel to MICHAEL A. CARDOZO, Corporation Counsel of the City of New York, a non-party that has a strong interest in this case, because compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid-funded personal care services program. I am an Assistant Corporation Counsel in the Appeals Division of the Office of the Corporation Counsel and the attorney who previously submitted a motion for leave to file an amicus brief, on behalf of the City of New York, in support of the petition for rehearing or rehearing en banc from this Court's July 22, 2004 decision. Therefore, I am familiar with the proceedings in this case.

2. I am familiar with the facts contained in this affirmation, based on information received from the First Assistant Deputy Commissioner of the Home Care Services Program at the City's Human Resources Administration ("HRA"), which oversees the Medicaid-funded program that provides personal care services to approximately 50,000 low-income frail elderly and disabled individuals, annually, through the use of approximately 60,000 personal care aides, commonly referred to as home attendants.

3. This affirmation is submitted in support of defendants-appellees' motion to stay the mandate. Compliance with this Court's decision, upon issuance of the mandate, will have serious ramifications for the City's Medicaid funded program, in both economic and noneconomic terms for everyone involved in the program, including the government, the home attendants, and individuals receiving personal care services. Additionally, as outlined in the defendants-appellees' motion papers, the certiorari petition to the Supreme Court will present a substantial question, including a split in the Circuits on an important federal issue. Given the important public interests involved, including the ramifications for the City's Medicaid-funded program upon compliance with this Court's decision, and the ensuing chaos in the program if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court, there is good cause for a stay. Therefore, it is respectfully requested that this Court stay the mandate, pending the filing of a petition for a writ of certiorari in the Supreme Court.

OVERVIEW OF THE CITY'S INVOLVEMENT IN THE PROVISION OF PERSONAL CARE SERVICES

4. The provision of health care services in the home has increased significantly in recent years. Since the early 1980's, hospital services have become much more intensive, and daily costs have escalated enormously. At the same time, many aspects of care formerly provided in hospitals and in long term care institutions can be effectively provided in the home. Vulnerable individuals most frequently prefer to receive care at home if possible, and this has resulted in the development of a number of programs to facilitate their ability to do so. The cost of these programs is largely covered by various forms of health insurance, including Medicaid.

5. New York City residents include a large number of low-income frail elderly and disabled individuals, many of whom live alone. New York City has been instrumental in the development of a Medicaid-funded program to provide personal care services under which Medicaid-eligible individuals can obtain assistance with activities of daily living (bathing, toileting, transferring, walking and nutrition) when these services are medically needed to allow them to continue to live at home. Personal care services must be ordered by a client's personal physician, and the determination of the medically-necessary level of personal care service to be provided to Medicaid clients is the responsibility of HRA.

6. Authorized Medicaid-funded services are delivered through contracts with over 90 provider agencies throughout the City. Medicaid clients may be authorized to receive personal care services for periods of time

ranging from 2 or 3 hours, two or three times per week, to continuous oversight, 24 hours each day, for impaired individuals. A home attendant may be required to sleep in the home and, in many ways, become a member of the household. The home attendant may accordingly be scheduled to deliver service for many more than 40 hours per week, and while these services must be medically required, they also require a substantive level of compatibility with the client and the client's family.

7. At the present time, the annual cost to the Medicaid program of personal care service in New York City is approximately $1.6 billion. This amount covers care provided to approximately 50,000 individuals annually by about 60,000 home attendants. There are a number of other modalities under which care is provided to Medicaid-eligible individuals in the home, but the City's oversight responsibility is limited to personal care services, which are discussed here.

RAMIFICATIONS OF COMPLIANCE WITH THIS COURT'S DECISION

8. Compliance with this Court's decision, upon issuance of the mandate, will have serious implications for the Medicaid-funded personal care service program administered by the City. Compliance with this Court's decision is expected to increase the cost of the program and required Medicaid funding by over $263 million per year. While this cost arguably could be somewhat limited by capping each home attendant's hours of service at 40 hours per week, the intimate and ongoing nature of the home attendant/client relationship, as well as clients' general unwillingness to have more than one or two attendants in the home, limit the ability to have multiple

home attendants providing care to a client, without jeopardizing the client's welfare.

Economic Implications

9. This Court's decision is estimated to increase the cost of the City's Medicaid-funded personal care program to the elderly and disabled by over $263 million annually. New York City's Medicaid funding will need to increase from $1.592 billion to about $1.855 billion annually in order to sustain its current client service levels. As set forth below, the estimated additional $263 million annual cost consists of: (a) overtime pay at time and one-half for home attendants who work in excess of 40 hours weekly; (b) an increase in billable and overtime hours for 24 hour daily care provided by "sleep-in" home attendants; and (c) travel time, which will now have to be paid to attendants who serve more than one client and travel between cases.

a. Paid Overtime

10. The City currently authorizes the delivery of approximately 105,777,000 hours of service annually to approximately 42,000 personal care service clients. Services to most of these clients are rendered by not-for-profit providers operating under the third-party employer exemption invalidated by this Court. New York City's HRA staff estimates that approximately 19% (20,098,000) of the personal care service hours provided in City Fiscal Year 2004 were provided by attendants working in excess of 40 hours weekly.

11. These hours would be subject to overtime pay if this Court's decision is upheld. The estimated incremental cost of overtime for the 20 million hours is approximately $102.9 million annually.

b. "Sleep-In" Cases

12. Among the innovations developed by the City to facilitate delivery of personal care services to its frail and vulnerable residents is a service modality known as "sleep-in" service. Under this approach, a home attendant stays with a client for a 24-hour period, during which time the attendant is on paid duty for 12 hours, and is off duty for the remaining 12 hours, and is provided with sleeping accommodations during this time. The "sleep-in" attendant may be roused up to three times during the unpaid hours, and so is available to assist the client with special needs, such as toileting or turning, during the night-time hours. Typically these services are provided by two home attendants during the week—one of whom stays with the client for five 24-hour periods, and the other for the remaining two. This program is well accepted by both clients and home attendants, and reflects the close relationship that is appropriately developed between them.

13. The City currently has 5,033 clients who receive 24 hour daily care from home attendants who "sleep-in". These sleep-in home attendants are present 24 hours daily and receive an hourly wage for each of 12 hours; they are not compensated for the 12 hour "sleep-in" portion of the day but, rather, receive a daily shift differential. Provider agencies are authorized to bill Medicaid for 84 hours weekly (12 hours daily x 7 days) for these cases.

14. Upon compliance with this Court's decision, the non-paid "sleep-in" hours would be limited to 8 hours daily under the Fair Labor Standards Act ("FLSA"). See 29 C.F.R. §785.22 (explaining generally that, where an employee is required to be on duty for 24 hours or more, a bona fide sleeping period of not more than 8 hours may

be excluded from hours worked and that interruptions of sleep by a call to duty must be counted as hours worked). Accordingly, the provider agency service payment authorization for these cases would have to be increased from 12 to at least 16 hours daily. These additional 4 hours daily for 5,033 cases will increase the billable hours for the City's contracted home attendant provider agencies by 7,348,180 hours annually, with a resulting additional annual cost to the government of approximately $112 million for straight-time service.

15. Further, the additional paid hours on these sleep-in cases will also have an overtime impact since the home attendants presently servicing these cases are already working hours that would be subject to overtime pay, upon compliance with this Court's ruling. Accordingly, the 7 million additional hours subject to wages on the sleep-in cases will also be subject to paid overtime. The cost of the overtime (i.e., the additional one-half-time cost) for these 7 million hours is about $37.6 million annually.

c. Travel Time

16. The City's Medicaid-funded personal care service program includes approximately 12,300 clients who receive an average of 21 hours of service weekly. Many of the home attendants service more than one of these cases in order to earn a full-time wage.

17. Presently, home attendants' wages are limited to hours actually worked; the home attendant is not paid for the time spent traveling between cases. Upon compliance with this Court's decision, the time spent in transit by these employees will be subject to wages under the FLSA. *See* 29 C.F.R. §785.38 (explaining generally that travel time spent by an employee in travel as part of his

principal activity, such as travel from job site to job site during the work day, must be counted as hours worked). The City's HRA staff conservatively estimates the annual cost to government as about $11.4 million.

18. In short, the economic impact of this Court's decision is tremendous, and will require a renegotiation of the contracts with the over 90 different provider agencies throughout the City, which actually provide the services.

Limitations on Frequent Change of Attendants

19. It might be argued that some of the costs outlined above could be avoided by limiting the hours of service currently provided to an individual client by a home attendant to a maximum of 40 hours per week. However, there are substantive reasons why this is not readily doable. The relationship between a home attendant and the client, while not limited to delivery of companionship, nonetheless is one of special intimacy and confidentiality. Building such a relationship is not a simple matter, and clients are in general unwilling to enter into such a relationship with more than one or two individuals. Some of the issues affecting this relationship are discussed below:

a. Privacy in the Home

20. Although the home attendant's role is to provide paraprofessional service to a client, the service setting differs significantly from a hospital or a doctor's office, in that the service is rendered in the client's home, and the nature of the service is intensely personal. The home attendant spends up to 24 hours each day in the client's home, tending to needs of an extremely personal nature, such as bathing or toileting. It is therefore essential for

the home attendant to build a trusting personal relationship with the client, as otherwise the attendant's presence will be seen as being overly intrusive, and the client will not cooperate or allow the necessary level of personal intervention.

21. Home attendants are trained and assisted to present themselves professionally to the client. However, to carry out personal care services appropriately also requires acceptance of the home attendant by the client. In many instances it takes a considerable time to build such a relationship, and clients often are very unwilling to enter into such a relationship with more than one or two such individuals. Experience shows that clients often are unwilling to accept alternative coverage when a home attendant takes vacation or sick leave, preferring to suffer lack of what may often be very necessary care until the person with whom the client is comfortable returns from leave.

b. Continuity of Care

22. Although the services provided by the home attendant are limited to assistance with activities of daily living, clients receiving this care are frail elderly and/or disabled, and the service has been determined to be medically necessary. Clearly, all clients are impaired to some extent through ongoing illness and disability, and these problems may well result in additional, immediate clinical needs. The home attendant is required to become familiar with the client's medical circumstances, to assist the client in making physician visits, and to promptly identify and report any changes in the client's clinical status. The home attendant must engage in ongoing interaction with the client regarding the client's health status: to do this requires that the client is com-

fortable with the home attendant and has confidence in sharing intimate information. The home attendant must be knowledgeable about the client's clinical arrangements, and must be able to contact the relevant medical professional if necessary.

c. Family Compatibility

23. In many instances, clients live in the home with other family members. The home attendant's services are limited to caring for the client, but the attendant must be able to render these services in a way that does not result in problems in the household. Building such domestic relationships can difficult and time-consuming. In other instances, the client may live alone. It then becomes the responsibility of the home attendant to assure that the client maintains adequate relationships with children, siblings, etc., and to assist with family relationships in a way that meets the client's requirements and expectations. Such relationships can be demanding and difficult, and the home attendant is required always to place the client's needs before those of the family members who may be placing pressures on both the attendant and the client.

24. In short, the inherently intimate and ongoing nature of the relationship between the home attendant and the client, as well as clients' unwillingness to have multiple attendants in the home, prevent the provision of additional home attendants for each client currently receiving personal care services, in order to keep costs down. As to clients newly entering the Medicaid-funded personal care services program, changes in the provision of personal care services, such as the provision of additional home attendants, may be required, in order to keep costs down.

CONCLUSION

25. In conclusion, complying with this Court's decision, upon issuance of the mandate, will have serious ramifications, in terms of both cost and the provision of care, for the entities and individuals involved in the City's Medicaid-funded personal care services program. There is good cause for a stay of the mandate, in light of: (1) the ramifications to the City's program; (2) the fact that the certiorari petition to the Supreme Court will present a substantial question, including a split in the Circuits on an important federal issue; and (3) and the ensuing chaos in the City's program—including another change in the renegotiated provider contracts and the disruption in the lives of individuals newly receiving personal care services—if the City complies with this Court's decision and this Court's decision is then overturned by the Supreme Court.

WHEREFORE, it is respectfully submitted that defendants-appellees' motion for an order staying the mandate pending the filing of a petition of a writ of certiorari in the Supreme Court should be granted.

I declare under penalty of perjury that the foregoing is true and correct. Executed at New York, New York on January 13, 2005.

/s/SUSAN CHOI-HAUSMAN
SUSAN CHOI-HAUSMAN
Tel. (212) 788-1159 or 1065

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.,
and MARYANN OSBORNE,

Defendants-Appellees.

DECLARATION OF CAROL RODAT IN SUPPORT OF MOTION OF DEFENDANTS-APPELLEES LONG ISLAND CARE AT HOME, LTD. AND MARYANN OSBORNE FOR A STAY OF THE MANDATE

Carol Rodat, under penalty of perjury, hereby declares as follows:

1. I am the president of the Home Care Association of New York State, Inc. (HCA). I make this declaration in support of the motion by Defendants-Appellees Long Island Care at Home, Ltd. and Maryann Osbome for a stay of the mandate pending the filing of a petition for a writ of certiorari in the United States Supreme Court.

2. The HCA is a not-for-profit organization that works to promote and support high-quality, cost-effec-

tive home care and community services for the citizens of New York State. HCA is an active participant in public policy discussions and legislative initiatives involving home health care services. HCA's membership encompasses approximately 250 home care provider agencies, including primarily non-profit and governmental organizations as well as some for-profit agencies. Collectively, HCA's members serve the majority of Medicare and Medicaid beneficiaries who require home care services in New York.

3. Based on my first-hand knowledge as President of HCA, I believe that the effect of the Panel's decision would be to burden third-party employers providing home companionship services, to the extent that they will be unable to continue providing quality, affordable companionship services to elderly and infirm patients throughout New York State.

4. The budgets of HCA's provider members are severely constrained. Most providers depend on some form of government reimbursement (Medicare and predominantly Medicaid) for the home health care services they provide to the elderly and infirm.[1] Medicaid reimbursement rates are calculated based upon cost report data from two years prior and are adjusted using the national Consumer Price Index.[2] As a result, reim-

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[1] *Cf.* Policy Brief, Long-Term Care: Medicaid's Role and Challenges 6 (Prepared for the Kaiser Commission on Medicaid and the Uninsured, Nov. 1999), *http://www.kff.org/medicaid/loader.cfin?url=/commonspot/security/getfile.cfin&PageID=13448* (most long-term care is financed by Medicaid program).

[2] *See* N.Y. Pub. Health Law § 3614 (Consol. 2004). In addition, New York State caps the administrative and general costs of all certified home health agencies at the statewide average.

bursement rates for home health care costs do not generally reflect current health care costs.

5. This situation is exacerbated by the fact that government spending on home health care has *decreased* during the last decade.[3] Such spending is likely to remain severely constrained despite the growing demand and need for home health care services.[4]

6. Given the limited public financial resources available for home health care, provider agencies face significant financial constraints. Their budgets cannot bear the cost of compliance with the Panel's holding without additional revenues from external sources, which are unlikely to be forthcoming.[5]

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[3] *See* Ex. A (Setting the Record Straight: A Response to 'The Plight of New York's Home Health Aides' 1-2 (2004).

[4] *See, e.g.*, Jennifer Steinhauer, New York, Which Made Medicaid Big, Looks to Cut It Back, N.Y. Times, Mar. 3, 2003, at B1 (New York State considering Medicaid a target for budget cuts); *cf.* U.S. Dept. of Health and Human Services, Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs 11 (Feb. 2004), *ftp://ftp.hrsa.gov/ bhpr/nationalcenter/RNandHomeAides.pdf.* at 8 (despite major cuts in Medicare funding, the Bureau of Labor Statistics predicts that home health aides and personal aides will increase by 62% by 2010).

[5] *See* Ex. B (Letter from Senator Christopher S. Bond, Chairman of the United States Senate Committee on Small Business, to Thomas M. Markey, Acting Administrator, Wage and Hour Division, U.S. Dept. of Labor at 3 (July 26, 2001) (costs of eliminating the third-party employer exemption outweigh any perceived benefits); Ex. C (Letter from Thomas Hamilton, U.S. Dept. of Health and Human Services, to T. Michael Kerr, Administrator, Wage and Hour Division, U.S. Dept. of Labor at 1 (Mar. 20, 2001) (doing away with the third-party employer exemption would cause a dramatic increase in needed Medicaid program expenditures).

7. If required to comply with federal wage requirements for companionship services without such additional funding, providers would be forced to implement measures that seriously disadvantage their home care patients.

8. Given providers' inability to fund any increased overtime, they would have to staff home companion cases on shorter shifts in order to avoid those overtime costs. The limited supply of workers willing to take such short shifts would almost undoubtedly result in uncovered hours. As a result, home care patients would either be denied some periods of care or receive care with less continuity.[6] Many patients may be forced into nursing homes if home care providers can no longer assure adequate and safe services.

9. Home care workers will also themselves be harmed if HCA's provider members are forced to eliminate or shorten shifts. Home health workers who staff cases requiring companionship services depend upon the wages and benefits that result from the hours that they work. Limiting their hours will result in reduced wages as well as loss of benefits in certain situations, likely causing employee attrition and thus heightening the staffing shortage that already exists.

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[6] For those New York State home care patients who pay for companionship services outof-pocket, the stakes are just as high. If employer agencies pass on the increased costs of wages, patients may be forced to forego services altogether or, at a minimum, to reduce the services they currently receive and require. *See McCune v. Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990); Joshua M. Wiener et al., *Catastrophic Costs of Long-Term Care for Elderly Americans*, in Persons with Disabilities: Issues in Health Care Financing and Service Delivery 182 (Joshua M. Wiener et al., eds., 1995).

10. In short, eliminating the third-party employer exception will effect a massive disruption to the delicately balanced system that makes home care—a desired alternative to institutionalization—an affordable and safe option for tens of thousands of home care patients in New York State.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ CAROL A. RODAT
Carol Rodat

Executed on: January 14, 2005

Setting the Record Straight

A Response to "The Plight of New York's Home Health Aides"

Introduction

In February of 2004, 1199/SEIU issued a report, "The Plight of New York's Home Health Aides," which made a number of allegations with respect to home health agencies in New York. The principal allegation is that in New York, home care is a system that by virtue of the way it is organized, allows the home health agencies to "siphon off as much as two thirds of the funding for administrative overhead. . ."

The Home Care Association of New York State, Inc. (HCA) and the New York Association of Homes and Services for the Aging (NYAHSA), membership organizations that represent all types of home care agencies, disagree with this allegation and with the analysis that 1199 applies to the problem of paraprofessional worker wages and benefits. HCA and NYAHSA have continuously advocated for an increase in the home health aide and personal care aide wages and benefits. The fact that much remains to be done in this area is attributable to State and federal policies that have led to under-funding at a time when other costs were escalating.

Looking at this problem requires a broader perspective. In fact, one must examine recent attempts to address the workforce crisis and the home care system as a whole if one is to understand how to begin to solve the problem of the home care workforce.

Workforce Recruitment and Retention Legislation

In 1999, HCA and NYAHSA began to publicize the fact that the home care workforce in New York was

decreasing to the point that some counties had closed intake, thereby limiting access to home care. HCA identified a crisis situation that needed immediate attention. NYAHSA's March 2000 report, *The Staffing Crisis in New York's Continuing Care System*, also called on State policymakers to address serious labor shortages in home care.

Although a valid case was made for the need for additional dollars to recruit and retain the home care workforce, State lawmakers decided to focus only on direct care workers in hospitals and nursing homes, and personal care workers, eliminating the skilled professionals and direct care workers providing care to patients in home health settings. By not advocating for including certified home health agencies (CHHAs) and long term home health care programs (LTHHCPs) in the original Workforce Recruitment and Retention Act funding, 1199/SEIU succeeded in limiting the dollars available to many of New York's home care agencies. Rather than addressing the needs of the entire home care system, State lawmakers elected to provide the downstate personal care workforce with $895 million in workforce dollars over four years. Upstate home care providers received only $69 million in workforce funding over three years—hardly parity.

Although the Legislature finally addressed the needs of the skilled home care workforce in the next State budget, they were given an increase of only 3% or about $50 million through the Medicaid rates. These dollars were (and continue to be) available for mechanisms that help recruit and retain staff, and can be applied in a number of ways in addition to wages and benefits (e.g., bonuses, special services). Moreover, these dollars are available for nursing staff as well as paraprofessionals. As nursing salaries have escalated in New York City

(according to *Crain's Health Pulse*, nurses' adjusted salaries in New York City are 121% of the state average), these limited dollars must be stretched to cover the professional and paraprofessional workforce.

The Problems With Home Care Reimbursement

It is important for policymakers and the public to understand the following facts about the home care system and its personnel, and why it still faces an uncertain future.

- ✓ The State and federal governments have made significant cuts to home care. Over the last 10 years, New York has cut Medicaid home care funding annually. The total (all payers) for the last decade is $1 billion. These cuts have been exacerbated by the fact that Medicare cut funding to New York's home care providers by $261 million. These cuts have had a significant impact on home care's ability to remain competitive in the rates it can pay to all staff.
- ✓ The counties and New York State have reduced access to home care. The counties have three home care programs for which they control access to Medicaid home care services: personal care, the Long Term Home Health Care Program (LTHHCP), and the Managed Long Term Care Program. In an effort to reduce their Medicaid costs, they have begun to limit hours in personal care, change the eligibility rules for the LTHHCP, and delay the processing of patients into home care programs. Some counties refuse to use the LTHHCP, and others severely limit access to the program through arbitrary policies that have no legislative or regulatory support. Most recently, the State implemented new "guidelines" for scoring LTHHCP patients. These changes, if allowed to con-

tinue, are expected to result in at least 30% of the beneficiaries losing access to the program.

- ✓ The State has allowed counties to ignore the Medicaid reimbursement methodology. The State has also allowed the counties to negotiate rates for personal care even though there is a rate methodology required by statute. Some counties take the lowest bid as the prevailing rate, and others take the average of all bids. Regardless, the fact that the State has allowed counties to compress these rates has also contributed to the worker shortage, particularly in upstate counties.
- ✓ The Medicaid rate methodology for CHHAs fails to recognize the current costs of care. Medicaid uses a specific set of steps to calculate rates for skilled home health care. These rates are set for service (nursing, physical therapy, speech pathology, occupational therapy, and home health aide), sponsorship (public and non-public), and geography (upstate and downstate). In order to establish these rates, the State uses cost report data from two years prior. From the cost reports, regional ceilings are established, and a trend factor is used to "update" the rates for inflation since the costs are two years old. The trend factor, however, is now set by the national Consumer Price Index (CPI) averaged over the span of a year. This change made in December of 1999, has cost New York's certified providers $106 million over the last four years (based on an estimated loss of 2.4% for inflation over four years on a base of $4.43 billion in revenues over the same period of time). The State also caps the Administrative and General (A&G) costs of every CHHA at the statewide average of these costs.

Rules for establishing allowable costs are derived from the Medicare fee-for service payment system, and specific allocations are required. Under these rules, home care agencies affiliated with hospitals and nursing homes are allocated a portion of the institutional costs for services the institution provides to the agency (e.g., billing). Moreover, there is a preponderance of nursing oversight that is required by statute and which goes into the A&G costs.

Although the Medicaid home care rate methodology has several components to it, the following points must be emphasized:

- The rates are two years old and do not recognize current costs;
- The inflation update is now tied to the CPI, which makes the inflation update lower than an update that is tied to costs of delivering medical goods and services;
- The CPI update not only fails to recognize the current health care costs, but is averaged over a year so that providers not only have an insufficient update factor but can find themselves overpaid and are then subject to recoupment of any overpayments;
- Individual agency rates are limited to regional ceilings; and,
- Administrative and general costs are capped, and many providers have A&G costs that exceed these caps and must still be covered.

✓ The regulatory structure siphons off dollars for staff. The 1199 paper charges that the CHHAs and Licensed Home Care Services Agencies (LHCSAs) "siphon

off" money for administrative overhead. In fact, the agencies that are certified by Medicaid *and* Medicare are required to comply with State and federal requirements or else they are not allowed to remain in business. These requirements include statutory benefits, supervision, training, scheduling, accreditation, billing, coding, and state audits and surveys. It is important to remember that the money paid for services must also cover the costs of quality improvement through the collection of data using the Outcome and Assessment Information Set (OASIS). OASIS data must be collected on all adult home health patients whose care is publicly funded. Data are collected at the start of care, at 60 day follow-up, when care is resumed after an inpatient facility stay, when there is a significant change in condition, and at discharge.

The Visiting Nurse Associations of America (VNAA) undertook a study of the actual costs for completing OASIS data collection every 60 days. They found these costs to be $105 for every 60-day episode of care. Medicare reimburses the home health providers only $4.32 per episode, and Medicaid's ceilings limit the ability of many providers to be fully reimbursed for the requirement.

- Home care needs capital for technology improvements. Although it is important for home health care agencies to be able to purchase technology to increase the productivity of the workforce, neither Medicaid nor Medicare currently pays for the telehealth technology that can double the number of cases a nurse can manage in a day, and Medicaid in New York has yet to address it—although several other states have. Home care agencies have needed to upgrade computer hardware and software in order to

efficiently operate. But unlike nursing homes and hospitals, home care providers are not able to use the sale of bonds to access capital for equipment. They must factor these needs into their budgets and must have a margin to address the capital equipment needs. Otherwise, they must depend upon grants or foundation support.

- ✓ Medicare is a significant payer of home health and must also be addressed if we are to retain a quality workforce. Depending on the specific home health agency, Medicare can account for anywhere from 40% to 60% of a home health agency's revenue. Medicare moved to a prospective payment system (PPS) in 2000 which pays for an episode of care with an episode being defined as 60 days or less. The change to PPS has lowered the number of visits provided during an episode of care. However, New York still far exceeds other states in its visits, particularly those of home health aides. For example, New York uses on average 21 home health aide visits for patients with diabetes. California uses 10; Michigan, 12; Minnesota, 11; Washington, 9.5; and Wisconsin, 12. While one can argue that New York's higher utilization may be appropriate, it places greater fiscal pressures on providers. It is also important to remember that since the passage of the Balanced Budget Act, Medicare has cut $261 million from provider reimbursement. Also, the recently passed Medicare prescription drug bill took another $14 million from New York's reimbursement by reducing the market basket update.
- ✓ Cash flow is often a problem in home care. In order to process a bill, home care agencies must have a physician signature as well as other necessary doc-

umentation (e.g., OASIS) completed by the nurse. These steps are sometimes delayed, requiring agencies to cover the costs of care without reimbursement.

With respect to the LTHHCP, processing a new patient in New York City can take anywhere from three to four months. During that time agencies admit the patient through an "alternate entry" process. By admitting the patient without approval from the Human Resources Administration (HRA), however, they are putting themselves at risk for the entire cost of care if New York City does not approve the application.

Recommendations

Although the 1199/SEIU paper recognizes the recent cuts in Medicare funding and the fact that nurses are in short supply and have several choices for employment, ***the* recommendations in the *paper fail to address the home health care system as a whole.*** We believe that the following recommendations would begin to address the problem:

1. Stop approaching home care in a piecemeal fashion that favors one type of agency or service over another. This means that the workforce demonstrations that New York State has implemented should *not* favor one section of the state over another, and home care must have parity with hospital and nursing home increases;

2. Streamline the paperwork so that home care can retain nurses, increase productivity, and increase the time spent with patients rather than paperwork;

3. Review the current costs of care alongside the current reimbursement rates and then determine whether or not there is sufficient funding through Medicare *and* Medicaid for LHCSAs, CHHAs and LTHHCPs so that wages and benefits are sufficient to recruit and retain a high quality workforce; and,

4. Provide home health agency access to capital and reimbursement for Medicaid telehealth visits so that technology can extend the home care workforce and increase productivity.

Setting the Record Straight

In addition to our recommendations, HCA and NYAHSA take issue with several of the specific recommendations in the 1199/SEIU paper and would like to clarify others for the record:

- HCA and NYAHSA supported a pass-through of new workforce recruitment and retention funding. HCA even drafted language that would require a pass through of new workforce dollars that were provided to CHHAs, LTHHCPs, and LHCSAs in the 2002 budget. SEIU/1199 did not support this proposal; and,

- Combining the administrative expenses for CHHAs and LHCSAs fails to recognize the true costs of both types of agencies. Instead, it treats the two as one agency, which they are not. LHCSAs have different requirements than CHHAs and their tasks are different. The costs of each need to be examined in light of the current *total* reimbursement that is available for a home health care case (i.e., home health aide and skilled service costs as compared to the total rate for each).

HCA and NYAHSA agree that there is a need for a living wage, health benefits, paid vacation, sick time, and a retirement plan for paraprofessional workers. We also believe that the home health aide and personal care aide need upgraded training and other forms of support that make it easier to work in the health care field (e.g., day care, transportation). We call on 1199 and policymakers to work with us to make sure that the funding is made available to home care for this to become a reality throughout New York State.

[LETTERHEAD]

UNITED STATES SENATE
COMMITTEE ON SMALL BUSINESS
WASHINGTON, DC 20510-6350

July 26, 2001

Mr. Thomas M. Markey, Acting Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Fair Labor Standards Team
Room S-3516
200 Constitution Ave., N.W.
Washington, DC 20210

By Facsimile: 202-693-1432

Dear Mr. Markey:

On January 19, 2001, the Clinton administration published a proposed regulation to redefine the exemption from the Fair Labor Standards Act (FLSA, the Act) provided by Congress for those employees who provide companionship services in a client's home. On March 19, 2001, I wrote to Secretary of Labor Elaine Chao to request more time to comment on the proposal, specifically with regard to the proposal's impact on small businesses. The Secretary then issued a notice in the Federal Register on April 23, 2001 reopening the docket to accept further comments on this proposal.

Although the Department asserts that this proposal is necessary because of confusion among both employees and employers over the scope of the companionship services exemption, no evidence is offered to support this

claim.[1] It is hard to avoid the perception that this proposed regulation was rushed out the door at the last possible moment in an effort to satisfy supporters of the Clinton administration where no genuine issue or reason for it existed.

Unfortunately, in its rush to get this proposal published before leaving office, the previous administration underestimated the impact of this proposal on the small businesses who provide these services. In addition, the Department's proposal to redefine this exemption goes beyond merely updating it to be consistent with current industry practice, all the way to eliminating effectively the exemption by redefining the duties that qualify for the exemption extremely narrowly. The Department further undermines the availability of the exemption by eliminating it for employees employed by a third party employer who provides companionship services for clients.

This directly contradicts the intent of Congress when it passed the amendments in 1974 which included this exemption. Thus, this proposal attempts to achieve through regulation what the previous administration was not able to achieve through legislation. Accordingly, this proposed regulatory change should be withdrawn as being inconsistent with the authorizing legislation.

The Department Incorrectly Applied the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act

When promulgating a regulation, the Department of Labor is required under the Regulatory Flexibility Act (RFA) to determine if the regulation will have a "significant economic impact on a substantial number of

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[1] 66 Fed. Reg. 5487, January 19, 2001.

small entities." If so, the Department must then conduct an Initial Regulatory Flexibility Analysis to determine further the impact of the regulation on small businesses, and to identify any alternatives that may be less burdensome to small businesses.[2]

The Small Business Regulatory Enforcement Fairness Act (SBREFA) places the further requirement that the regulation and supporting analyses be submitted to the General Accounting Office and both Houses of Congress for review before it goes into effect. If the regulation will have an impact of $100 million or more on the economy, the regulation can not take effect until 60 days after Congress receives the report or it is published in the Federal Register, which ever is later.[3] The Department asserts that this proposed regulation will not have an impact of $100 million or more and then concludes that because this regulation is not a "major" rule, as defined by SBREFA, "approval by the Congress under SBREFA" is not required.[4]

Such a conclusion is nonsensical as it does not capture the requirements of SBREFA accurately. Congress does not "approve" regulations under SBREFA, it can only disapprove regulations and this is not a function of whether the regulation is a "major rule."

In applying the RFA, the Department erroneously concludes (as explained below) that this proposed regulation will not have a "significant economic impact on a substantial number of small entities." However, the Department proceeds to conduct a regulatory flexibility analysis to support this conclusion even though a regulatory flex-

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2 5 U.S.C. 603, 605(b).

3 5 U.S.C. 801 (a). This title of SBREFA is commonly referred to as the Congressional Review Act.

4 66 Fed. Reg. 5486.

ibility analysis is only required if the Department concludes that the proposed regulation would have such an impact.[5]

To determine the number of small businesses affected, the Department relics on the U.S. Economic Census for the number of home health care service businesses. The Department concedes that "most of the entities potentially affected by this proposal would likely meet the applicable criteria defining a small business in the home-health-care industry." Indeed, the Department has determined that 98% (16,486 out of 16,895) of the businesses listed in the U.S. Census Bureau's 1997 Economic Census under the home-health-care services industry category would be below the $10 million annual receipts threshold used by the Small Business Administration to define a small business in this industry.[6]

The Department then concludes that, even though this proposal would require these businesses to comply with the FLSA where they have not had to previously, the proposal would not represent a "significant economic impact." Since the comment period was reopened, I have heard from hundreds of small businesses from around the country who have explained in detail the impact this regulation would have on their operations. While these businesses are paying their companionship services employees wages that are well above the minimum wage, the prospect of having to fit their schedules into the statutory requirements for overtime would mean a significant increase in the amounts these employees would earn. Many of the visits with clients include over night stays which last longer than the eight hour work period allowed before overtime must be paid. Requiring

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[5] *Id.*

[6] 66 Fed. Reg. 5487.

overtime to be paid would mean an extra 50% per hour worked beyond eight. One business indicated this would result in a 75% increase in the cost to the client.

Unfortunately, one of the likely consequences of increasing the cost this much will be that those who need this assistance will not be able to afford this assistance or will be forced to get it from less professional operations. Another consequence of this proposal is that because of the increased cost of operations, it would cause employees to be given less hours thus reducing their income. Both of these outcomes undermine whatever benefit may be achieved by restricting or eliminating the exemption from FLSA for employees providing companionship services.

The Department Proposal Creates More Confusion Than it Cures

The fundamental problem with the proposed changes to this regulation is that employers are not present in the workplace to determine how much time is spent on the activities that the Department has identified as qualifying for the exemption. Despite the Departments assertions that this proposal is necessary to clear up confusion[7], any adjustment to the current definition will certainly create more confusion. With a 26 year history of complying with the current regulation, whatever vagueness is present has been incorporated into employer practices, and employers and employees have come to know what to expect.

No matter which option of the Department is considered, it would require a determination by the employer about how much time an employee in the client's home spends performing specific tasks some of which would

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[7] *Id.*

allow the employer to take advantage of the exemption and some of which would not. This is all but impossible for these employers to do given the remote location of the work activities. This opens up many possibilities for fraud, confusion, and abuse. Although Congress left the term "companionship services" to be further defined by the Secretary, the term was left without specific definition to reflect the broad category of services that could qualify.[8]

By trying to parse the terms "companionship services" and "fellowship, care and protection" further, the Department is introducing further subjectivity and speculation to an employer's determination of whether the exemption applies. Furthermore, the term "fellowship" which the Department is suggesting must be at the core of the companionship duties to qualify for the FLSA exemption is not even mentioned in the legislation establishing this exemption. Thus, the Department is injecting a requirement which Congress never envisioned or intended.

Eliminating the use of the exemption for third party employers[9] not only would cause problems for these employers, but would likely create difficulties for the clients who previously relied on these companies. Without this exemption, these services arc likely to be significantly more expensive than these elderly individuals can afford thus requiring them to become the employer instead of contracting with a third party employer. Many elderly do not care to be in this role, preferring the sim-

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[8] Exempting ". . .any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms arc defined and delimited by regulations of the Secretary)", 29 U.S.C. 213 (a)(15).

[9] Proposed revision to 29 CFR 552.109 (a)(c).

plicity and reliability of using a third party who is in the business of supplying home care personnel. The reason for the proliferation of these companies is the simplicity and reliability of the service provided by them. Eliminating the companionship services exemption for third party employers would thus create problems for both these employers and their clients.

The Department Contradicts the Intent of Congress by Eliminating the Companionship Services Exemption

The Department has proposed to eliminate the companionship-services exemption by both narrowing the definition so much as effectively to cancel the exemption, and by eliminating it outright for third-party employers providing these services. Whatever latitude Congress may have provided the Secretary to define further the terms of this exemption, it is unequivocal that Congress intended the exemption to exist. Indeed, in the same 1974 amendments, Congress eliminated the exemption that had previously covered domestic workers. Had it wanted to, Congress would have similarly made companionship services covered by the FLSA. Instead, Congress went out of its way to exempt these services from the FLSA. The Department's attempts to nullify this exemption, therefore, contradict the intent of Congress and suggest that the previous administration was desperately trying to achieve through regulation what it could not achieve through legislation.

For all of these reasons, the proposed changes to the FLSA regulations affecting the companionship services exemption should be withdrawn.

Sincerely,

KIT BOND
Christopher S. "Kit" Bond

[LETTERHEAD]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration
Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

March 20, 2001

T. Michael Kerr, Administrator
Wage and Hour Division
Employment Standards Administration
U.S. Department of Labor
Attention: Fair Labor Standards Team
Room S-3516
200 Constitution Avenue, NW
Washington, DC 20210

Dear Mr. Kerr:

We are responding to your request for comments on the Department's NPRM to amend the provisions of the Fair Labor Standards pertaining to the exemption for companionship services. We offer the following comments for your consideration.

Fiscal Impact

DOL estimates that the proposed regulation would increase Medicaid program expenditures by somewhere between $30-$40 million. We believe that the Department has underestimated the impact of the proposed regulation on the Medicaid program. For example, the proposed regulation focuses solely on the limited issue of minimum wage and does not take into consideration

other related issues such as the definition of overtime pay and related costs.

Scope of the Regulation

The regulation is designed to address a perceived problem by very narrowly focusing on the definition of companion services. However, the regulation fails to recognize the broader context in which such services are provided. Although DOL speaks to the need to revise the regulation in order to make consistent with the changing times, the regulation fails to accurately reflect the changing environment. There are aspects of the provider continuum other than the category designation that need to be addressed. For example, as mentioned previously, the issue of overtime pay is an important element that is omitted from the proposed regulation. This issue is particularly pertinent when considering how to pay providers who do not reside in an individuals home but instead sleep overnight a few days a week in order to be on-call to provide assistance if needed.

Joint Employment

An increasing trend in the delivery of community-based services is to allow recipients greater control over the provision of community-based services by utilizing the concept of consumer direction. In a model of consumer direction, the client often is the employer of the caregiver. The client, however, may choose to work with a fiscal agent that assists the client with the financial aspects of the employer responsibilities such as handling deductions, such as FICA and State and local taxes, from the provider's paycheck. As proposed, the language governing joint employment would exclude such consumer directed models from the exemption even though the client is the employer.

In closing, we would like to thank you for this opportunity to comment on this important issue. We hope that you will find our comments helpful as the Department moves ahead to develop and implement standards governing the provision of companionship services and we offer our assistance to you in this effort. Please feel free to contact Mary Jean Duckett at 410-786-3294 if you should have any questions or require additional information.

Sincerely,

MARY JEAN DUCKETT

for Thomas Hamilton
Director
Disabled and Elderly Health
Programs Group

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 03-7666

EVELYN COKE,

Plaintiff-Appellant,

—against—

LONG ISLAND CARE AT HOME, LTD.
AND MARYANN OSBORNE,

Defendants-Appellees.

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

AFFIDAVIT OF PHYLLIS A. WANG

PHYLLIS A. WANG, being duly sworn, deposes and states:

1. I am the President of the New York State Association of Health Care Providers, Inc. ("HCP"). I make this affidavit in support of HCP's motion for leave to file a proposed *amicus curiae* brief in support of Long Island Care at Home's petition for panel rehearing and rehearing *en bane in Coke v. Long Island Care at Home, Ltd.*,

(No. 03-7666), 2004 WL 1632642 (2nd Cir. (NY) July 22, 2004).

The New York State Association of Health Care Providers

2. HCP is a not-for-profit industry association of home and community-based health care providers. HCP represents approximately 500 offices of licensed home care service agencies, certified home health agencies, long term home health care programs, hospices and related health care organizations throughout New York State.

3. HCP's purpose is to foster the interests of the health care industry and the public it serves by developing and supporting programs and policies to promote the highest quality of health care for the residents of New York State.

4. As the representative of home care agencies throughout New York State, HCP has unique, industry-wide access to information showing that the Court's decision that the third-party employer exemption contained in 29 C.F.R. § 552.109(a) should no longer be enforced would have major adverse effects on home care agencies, their employees and the many thousands of patients who require the home and community based services they provide.

5. As set forth more fully below, it is critical that the Court consider the grave, real world implications of eliminating the third party employer exemption. HCP seeks leave to serve as *amicus curiae* so that it can offer for the Court's consideration information regarding the substantial, and potentially traumatic, implications of the Court's decision.

Survey of HCP Members

6. In response to this Court's decision in *Coke v. Long Island Care at Home, Ltd.*, HCP undertook a survey of its member agencies to assess the potential impact of the Court's determination that the third party employer exemption set forth in federal regulation at 29 C.F.R. § 552.109(a) should no longer be enforced. The survey results show that the Court's decision would have major adverse effects throughout the home care industry.

7. The survey was designed by HCP staff and sent to all HCP member agencies throughout the State, including branch offices, by e-mail or fax on August 11, 2004. Agencies were asked to submit responses no later than August 26, 2004.

8. Providers could complete the survey on-line through Survey Monkey, an internet survey tool, or by faxing the answers directly to HCP. HCP staff entered the responses received via fax into Survey Monkey and analyzed the full set of data. The data was checked for entry errors, and the survey analysis was checked as well.

9. HCP staff determined the number of respondents for each question and the frequency of each specific response (e.g. the number of "yes" answers and the number of "no" answers to a question), and then calculated the occurrence rate of each response as a percentage of the total number of responses to that question. HCP also calculated sum, average, minimum, maximum and median responses. Open ended responses were listed in the final results as well. Finally, in some cases HCP analyzed the data to reveal the relationship between agency responses to two questions asked in the survey, such as

the percentage of overtime hours to total hours that were paid to paraprofessionals.

10. Twenty percent of member agencies responded to the survey, despite the short timeframe permitted.

11. Ninety-seven percent of respondents were licensed home care services agencies.

12. Agencies were asked to identify the region(s) of the State they serve, using their HCP Chapter affiliation. Chapter affiliations included Long Island (26% of respondents), New York City (19%), Northeastern New York (18%), Central New York (10%), Hudson Valley (10%), Western New York (9%) and the Finger Lakes (3%).

Impact of the Court's Decision on the Home Care Industry

13. HCP's recent survey of its member agencies makes it readily apparent that invalidation of the third party employer exemption would have ramifications throughout the home care industry in New York State. That impact would be particularly severe in New York City, on Long Island and in other downstate areas. The simple fact is that nearly 70% of all responding agencies—and over 90% of downstate respondents—compensate employees for overtime hours in a manner that the Court's decision would make impermissible.

14. On average, 29% of all cases serviced by responding agencies require more than 40 hours per week of service. Those cases, which involve the most infirm patients to whom home health care services are provided, are those most likely to be adversely affected by the Court's decision.

15. HCP stresses that the home care industry strongly supports its workers and recognizes that good compensation is critical to the industry as a whole. Home care paraprofessionals are the backbone of the home and community based service delivery system. The home care industry has been trying to improve wages for these workers for many years.[1]

16. The enormous practical problem the home care industry faces in its efforts to increase employee wages, however, is that the great majority of home care services are funded by Medicare, Medicaid and third-party insurance, which establish reimbursement rates for home care services. Unlike other employers, therefore, home care providers cannot simply raise prices to cover an increase in labor costs.

17. Under the Medicaid program as it is administered in New York, aide services are reimbursed either at a fixed rate or at a rate based on agency costs reported at least two years prior to the date of reimbursement. Although Medicaid reimbursement rates might (at least in theory[2]) be adjusted to accommodate the higher overtime costs that would result from the Court's decision, the reimbursement rates would not reflect the increased

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[1] It is important to note that the facts alleged by Plaintiff in this action—to wit, that she was not paid either minimum wage or overtime are unusual in the home care industry. Hourly wages paid by survey respondents for home health aides ranged from $6.30 to $11.82.

[2] In fact, the State and counties may, and frequently do, choose not to increase reimbursements, regardless of whether providers have borne increased costs. The recent history of funding for Medicaid and Medicare gives no cause for even a shred of hope that federal, State or local legislatures would increase funding to accommodate higher overtime costs.

overtime costs until two years after the cost increase occurred.

18. The reality is that agencies could not possibly sustain current levels of overtime services, at such dramatically increased cost,[3] for those two years. Home care agency budgets have been severely pared back in the last decade, largely as a result of Medicaid and Medicare reimbursement reductions by the State and federal governments. Agencies lack the resources necessary to absorb such a huge increase in overtime costs. Faced with the prospect of waiting two years for an increase in the Medicaid reimbursement rate, agencies would have no choice but to drastically reduce overtime hours.

19. The result of the Court's decision will be near-term chaos in the home care industry and long-term loss of home care services that are essential to the health and well-being of many New Yorkers—including, in particular, the medically indigent New Yorkers to whom home care services are inaccessible but for the Medicaid program.

Impact on Home Care Workers

20. The unique fiscal constraints to which the home care industry is subject likely will mean that the Court's decision will harm, rather than help, home care workers. As one HCP member noted:

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[3] For example, an agency paying an hourly wage of $9.00 is currently required under New York law to pay overtime at $7.73 (1 1/2 times the minimum wage of $5.15). 12 N.Y.C.R.R. § 142-2.2. With the elimination of the federal third party employer exemption, the agency would be required to pay an overtime rate of $13.50 (1 1/2 times the regular rate). 29 U.S.C.A. § 207 (West 1998).

> Please tell the powers that be that if this [court decision] was designed to help the paraprofessionals, it will do just the opposite. Medicaid and insurance reimbursement will not allow for the cost of overtime, thereby forcing us to limit hours to 40 per week. Almost all of our aides want the extra time that they will lose.

This response was echoed by more than 60% of survey respondents statewide, and over 85% of downstate respondents, who said that they could no longer authorize overtime hours if they were required to change the overtime wage calculation for paraprofessionals to one and one-half times the employee's regular rate of pay without an offsetting increase in reimbursement.

21. HCP members expressed concern that a reduction in available work hours would result in increased staff turnover: some employees count on overtime hours to make ends meet. The survey results show that, on average, nearly 40% of the agencies' paraprofessionals were paid overtime wages during 2003.

22. In addition, an upstate agency responded that the Court's decision could have a harsh impact on its employees by forcing reductions in base wages:

> NYS Medicaid reimbursement already caps the direct aide wage and training component of our rate. Therefore we already have wage issues. Paying overtime at 1.5x regular wage would necessitate lowering base wages and/or limiting hours of care to clients. Hiring more paraprofessionals is not a real option as labor market is already tapped. This issue would cause serious disruption/discontinuation of services if corresponding rate adjustments do not accompany.

23. In sum, the Court's decision worsens, rather than relieves, the conundrum facing the home care industry in its efforts to improve conditions for its workers. While elimination of the third-party employer exemption would increase overtime rates for home care workers, information from agencies throughout New York State establishes that it would not increase—and in many cases would reduce—actual earnings for workers.

Disruption in Continuity of Care to Patients

24. The impact of the Court's decision would also be felt by home care clients. The elimination of overtime hours would have a powerful impact on the agencies' ability to provide continuity of care to patients—that is, the provision of services consistently by the same personnel to the same patients. Continuity of care is so widely recognized to affect the quality of patient care that New York State regulation requires home care agencies to ensure continuity of care to the extent possible. 10 NYCRR § 766.2(a)(3). Sixty-eight percent of respondents, and 94% of those in the downstate areas, believe that the overtime change will have an adverse impact on their ability to provide continuity of care.

25. Because agencies will have to reduce overtime hours in order to avoid incurring unreimbursed costs, they will be forced to utilize more caregivers—each working a smaller number of hours—to service a single patient. Fifty-three percent of survey respondents specifically stated that they would no longer be able to limit the number of aides assigned to a case, and 66% responded that they would not be able to accommodate client requests that their care be provided consistently by the same aides—that is, aides whom the clients have come to know and who are, by experience, knowledge-

able about the clients' care needs. Among downstate respondents, those numbers increased to 77% and 91%, respectively.

26. Ninety-eight percent of responding agencies, reflecting input received from client satisfaction surveys, complaint calls, and requests for caregivers, said that client satisfaction is greater when there is continuity of care. Ninety-five percent of respondents have clients who request a particular aide. Survey respondents have affirmed the obvious: Individuals served in their homes do not welcome and would not benefit from constant changes in their caregivers. Decreased continuity of care would be undesirable in every respect.

27. Responding agencies also expressed concern that the change in the overtime calculation would result in uncovered shifts and, thus, an inability to service all of those individuals needing home care.

28. In sum, the Court's decision that the third party employer exemption set forth in 29 CFR § 552.109(a) is unenforceable would have a severe impact on the elderly and infirm who are the recipients of companionship services.

29. HCP respectfully requests that the Court grant HCP leave to file HCP's proposed *amicus curiae* brief and grant Defendants-Appellees' petition for panel rehearing and rehearing *en banc*.

PHYLLIS A. WANG

Phyllis A. Wang

Sworn to before me
this 14 day of January, 2005.

HARRY DUNSKAR
Notary Public

Harry Dunskar
Reg # 02DU6098788
Exp. 9/22/07
Albany County, State of New York